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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1511

LARRY DICKINSON & GIBBS ADAMS

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Gibbs Adams and Larry Dickinson, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on April 9, 1973, which affirmed a judgment of the United States District Court of the Middle District of Louisiana, finding petitioners guilty of criminal contempt under 18 USC §401(3).

OPINIONS BELOW

The first opinion of the Court of Appeals for the Fifth Circuit dated August 22, 1972 has been published at 465 F.2d 496, and is printed in Appendix A. The second opinion of that Court, entered on April 9, 1973, has not yet been published and is printed herein as Appendix B.

Except for the opinion of Judge West, dated October 10, 1972 and published at 349 F. Supp. 227, the orders, opinions and judgments of the United States District Court for the Middle District of Lousiana have not been published, but are printed herein as follows:

DATE	ORDER, OPINION OR JUDGMENT	APPENDIX
11/1/71	Order of Judge E. Gordon West forbidding report of testimony taken in Open Court	C
11/2/71	Notice and order to Gibbs Adams to show cause why he should not be held in criminal contempt	D
11/2/71	Notice and order to Larry Dickinson to show cause why he should be held in criminal contempt	E
11/8/71	Oral Reasons of Judge E. Gordon West for finding defendants, Larry Dickinson and Gibbs Adams, guilty of criminal contempt and sentences of each to pay a fine of $300.00	F
11/8/71	Judgment of conviction against Larry Dickinson of criminal contempt and a fine of $300.00	G
11/8/71	Judgment of conviction against Gibbs Adams of criminal contempt and a fine of $300.00	H
11/10/71	Written Opinion of Judge E. Gordon West for judgment of contempt	I

DATE	ORDER, OPINION OR JUDGMENT	APPENDIX
10/10/72	Written Opinion of Judge E. Gordon West, finding petitioners in contempt, after remand, 349 F. Supp. 227	J

The newspaper articles reporting what transpired in open court on November 1, 1971, in violation of Judge West's order, are made a part hereof as Appendices K & L.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Is the publication in a daily newspaper of a factual account of proceedings in open court concerning a trial with political and civil rights implications, in violation of a court order forbidding such publication, punishable as criminal contempt, where (a) the order was patently invalid as an infringement on the right of free speech, and (b) compliance with the order, pending appellate judicial relief to set it aside, would have restrained the exercise of that right.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

STATUTORY PROVISIONS INVOLVED

Petitioners were convicted under 18 U.S.C. §401:

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

STATEMENT OF THE FACTS

Frank Stewart, a civil rights worker, was indicted in Louisiana State Court on a charge of "conspiracy to murder" Woodrow W. Dumas, Mayor of Baton Rogue. Stewart then filed a suit for injunctive relief and damages in United States District Court against Charles H. Dameron, acting District Attorney, and others, alleging that the State proceeding was not brought with any expectation of securing a conviction, but rather to harass Stewart in order to suppress his exercise of First Amendment rights. This matter was heard on the application for preliminary injunction by respondent, Judge West, and the preliminary injunction was denied. See *Stewart v. Dameron*, 321 F. Supp. 886. The denial of the preliminary injunction was appealed to the Court of Appeals for the Fifth

Circuit, which remanded the case with instructions that a hearing on the preliminary injunction be held in accord with *Younger v. Harris*, 401 U.S. 37 (1971). It was in accord with this mandate that the hearing on November 1, 1971, was being held.

During proceedings in Open Court on November 1, 1971, Judge E. Gordon West, on his own motion, entered the following order:

> "And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rule in connection with Fair Trial Free Press provisions, the Rules of this Court.
>
> It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.
>
> This order is made subject to the sanctions provided by law in the event of any violation of this order.
>
> Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being

> held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently I do not want – and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial – of this hearing." (Appendix C)

Larry Dickinson and Gibbs Adams were newspaper reporters employed by Capital City Press, the publishers of *The Morning Advocate* and *The State Times* newspapers in Baton Rouge and, as such, were assigned to cover the proceedings in Open Court on November 1, 1971 in the Frank Stewart case. After the hearing, these reporters, believing and affirming that Judge West's Order violated their First Amendment rights and the First Amendment rights of the readers of their newspapers, wrote newspaper articles which were published in *The State Times* on November 1, 1971 (Appendix K) and *The Morning Advocate* on November 2, 1971 (Appendix L) which contained factual reports of the proceedings which had taken place in open court and thus admittedly violated the terms of the Court's Order.

On November 8, 1971, these reporters were convicted of criminal contempt by Judge E. Gordon West and were fined $300.00 each. From this judgment, a Notice of Appeal was filed on November 8, 1971 to the United States Court of Appeals for the Fifth Circuit.

On August 22, 1972, the United States Court of Appeals for the Fifth Circuit held that the order of Judge West prohibiting the publication of testimony taken in Open Court, was invalid as contrary to the First Amendment of the United States Constitution. The Court also

held that, nevertheless, the defendants were subject to punishment for contempt even though the order they violated was constitutionally infirm. The Court then reversed the judgment of conviction and remanded this matter for additional consideration by the lower court "for a determination of whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm." *United States v. Larry Dickinson and Gibbs Adams,* 465 F.2d 496 at p. 514 (Appendix A).

On remand, Judge West again convicted defendants and again imposed fines of Three Hundred and No/100 ($300.-00) Dollars each. See Appendix J.

An appeal was again taken to the United States Court of Appeals for the Fifth Circuit and on April 9, 1973, the Court of Appeals affirmed the lower court judgment. See Appendix B.

On April 19, 1973, petitioners moved for a Stay of the Court's Mandate, pending the filing of a petition for a Writ of Certiorari, whereupon, by order dated April 23, 1973, the Court of Appeals stayed its mandate. (Appendix N). The judgment of the Court of Appeals, dated April 9, 1973 is found at Appendix M.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT'S ORDER DIRECTLY CONFLICTED WITH PRIOR DECISIONS OF THIS COURT, WAS THUS PATENTLY INVALID, AND OPERATED AS AN UNCONSTITUTIONAL PRIOR RESTRAINT OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT

As indicated above, this case involves the punishment of two newspaper reporters for criminal contempt of a Court Order which forbade them (and others) from reporting in news media events which occurred in open court, and which involved a political and civil rights matter of immediate interest to the public. Thus, the Order was, on its face, patently invalid and in direct conflict with prior decisions of this Court. This Court has repeatedly held that "A trial is a public event. What transpires in the courtroom is public property. * * * Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."[1]

This doctrine was reaffirmed in *Estes v. Texas*,[2] and it applies with particularly pressing force where the events

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[1] *Craig v. Harney*, 331 U.S. 367, 374 (1947). "What transpires in the courtroom is public property." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

[2] 381 U.S. 532, 541-42 (1965):

> . . . reporters of all media * * * are plainly free to report whatever occurs in open court through their respective media.

See, also, *Stroble v. California*, 343 U.S. 181 (1952).

involve, as they do here, charges of malicious overreaching by public officials. Maximum freedom of the press in reporting judicial proceedings is an essential prerequisite where the judiciary must "determine whether a charge is found upon reason or was dictated by an intimidating power or by malice and personal ill will."[3] (Court's footnotes omitted).

These decisions, and myriad more which could be cited, make it clear beyond doubt that the District Court's Order was not only invalid (as was recognized by the Court of Appeals below in the decisions here involved), but was *patently* invalid as a direct violation of the First Amendment. Indeed, if this Order, which so plainly violated the commandment of the First Amendment, is not "patently invalid," it is difficult to conceive of a court order which could be so characterized.

As patently invalid, therefore, the District Court's Order fell into that class of orders which are "frivolous and not substantial," and which therefore, needed not be obeyed until overruled by higher court. The rule was set forth as long ago as 1885 in *Ex parte Fisk*, 113 U.S. 713, 718.

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction,

---

[3] *Wood v. Georgia*, 370 U.S. 375, 390 (1962). This Court also stressed in *Wood* that "Particularly in matters of local political corruption and investigations it is important that freedom of communications be kept open . . ." (370 U.S. at 390).

> is void, and the order punishing for the contempt is equally void."[4]

As Justice Frankfurter persuasively argued in *United Mine Workers,*[5] a court's order need not be obeyed upon penalty of a contempt conviction when the court "is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities . . ." Such an order may "be disobeyed and treated as though it were a letter to a newspaper" because the court "would not be acting as a court. He would be a pretender to, not a wielder of, judicial power." (330 U.S. at 309-310) To the same effect, see *In re Green,* 369 U.S. 689 (1962), where this Court made clear that a state court could not punish for contempt of an order which it had no power to issue. In *Green,* the state court's order was one which it had no power to issue because of preemption by a federal statute. The District Court's order in this case was also invalid because of preemption – preemption by a *constitutional* rather than merely a statutory prohibition. An order plainly in violation of the First Amendment stands on no firmer foundation than the invalid order in *Green.*

Moreover, the District Court's Order here was doubly invalid since it also illegally operated as a "prior restraint" on free speech. The Order, if followed at all, would have delayed publication of fresh and pressing news items until such time as a higher court could overrule it after litigation. But, to require news reporters to cease publication of immediate news events pursuant to a *prima facie* invalid

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[4] To the same effect, see *Ex parte Rowland,* 104 U.S. 604 (1882). *In re Ayers,* 123 U.S. 443 (1887).

[5] *United States v. United Mine Workers of America,* 330 U.S. 258, 309 (1947) (concurring).

District Court order, until such time as the order could be reviewed and reversed by a higher court, has a "chilling effect" even beyond that of a criminal statute.[6] Such an order could be upheld, if at all, only upon the most compelling and pressing showing of overriding public need as might be present in times of war or national emergency. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971):

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Certainly, neither the lower court, nor the government, nor indeed, the Court of Appeals in the case here under review, have put forth any justification which could overcome the "heavy presumption" against the constitutional validity of a prior restraint upon the press. The suggestion

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[6] Professor Paul Freund has pointed out (*The Supreme Court and Civil Liberties*, 4 Vanderbilt Law Rev. 533, 539 (1951):

> "If disobedience of the interim order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute."

in the Court of Appeals opinion that the restraint on free speech or a free press is justified as necessary to engendering respect for the judicial process has been specifically rejected as a ground upon which such a restraint could issue. As Justice Black stated in *Bridges v. California*, 314 U.S. 252, 271 (1941):

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. (Footnotes omitted)

Had a legislature attempted to enact a statute which required prior approval by the state before the exercise of First Amendment free press rights, that statute could clearly have been disobeyed and its illegality pleaded as a complete defense not only to a violation of the statute itself, but also to a violation of an *ex parte* temporary restraining order issued by a state court pursuant to the statute. *Thomas v. Collins*, 323 U.S. 516, 540 (1945):

> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing

> a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction.

Thomas, applicants submit, is completely dispositive since it makes clear that a plainly invalid prior restraint on free press through the device of a court order can have no higher dignity than could an invalid statute purporting to achieve the same result.[7]

The cases relied upon by the Court of Appeals to affirm petitioners' convictions (*United States v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. State of Kansas*, 258 U.S. 181 (1922); *Gompers v. Buck Stove and Range Co.*, 221 U.S. 418 (1911); and *Walker v. City of Birmingham*, 388 U.S. 308 (1967)) are all clearly distinguishable. These cases cite the normal rule that, in general, court orders must be obeyed until tested by judicial review proceedings. Nevertheless, these cases are inapplicable here because:

(a) None involve "pure" free speech, or an attempt to impose a prohibition thereon through the device

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[7] It should also be noted that the class of cases exemplified by *Freedman v. Maryland*, 380 U.S. 51 (1965), which allow temporary restraints of allegedly obscene materials pending review by a higher court, are not in point. These cases rest, as Justice Brennan (concurring) recognized in *New York Times Company, supra*, 403 U.S. at 726, upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth v. United States*, 354 U.S. at 476, 481 (1957). Here there is no question that the material sought to be suppressed is not only within the protection of the First Amendment, but it was precisely the type of information which the First Amendment was designed to protect.

of a court order.[8] The importance of this distinction was plainly recognized by the Court in *Walker, supra.* In *Walker,* this Court explicitly referred to the crucial difference between the protection afforded to the communication of ideas by conduct such as marching and picketing (the conduct at issue in *Walker*), and the protection afforded "to those who communicate ideas by pure speech" (388 U.S. at 316), recognizing and emphasizing a critical distinction made earlier by this Court in *Cox v. Louisiana*:[9]

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Whatever residual power states or courts may have with respect to temporarily restraining conduct such as marching, picketing or patrolling, they clearly do not possess power to impose restrictions upon a free press doing nothing more than reporting events which transpired in open court on a matter of controversial public importance.

(b) None of these cases concern the imposition of a prior restraint upon the press. As noted above, such prior restraints are presumptively constitutionally invalid

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[8] *Mine Workers, Howat* and *Gompers* involved attempts to prohibit, through court orders, picketing and other concerted activities in labor disputes. *Walker* involved prohibition of picketing in a civil rights confrontation.

[9] 379 U.S. 536, 555 (1965).

and can be imposed, if at all, only upon a showing of the most overriding national interest. The extraordinary protection rendered to a free press derives not only from the explicit commands of the First Amendment, but is based, at least in part, on the unique quality of news reporting. News is, almost by definition, reliant upon its contemporaneous nature. A delay, even for a little time as a few days or weeks while litigation in a higher court is pursued, may well destroy its very value.[10] In the case of prior restraints, the doctrine exemplified by *Near v. Minnesota, New York Times, Thomas, and Estes, etc.* applies, rather than the doctrine typified by *Walker, Howat* and *United Mine Workers.*

(c) None of the cases relied upon by the court below involve an order as patently invalid and "so obviously traveling outside" the judicial orbit as the one here at issue. In each of these cases, the court was attempting either to enforce a statute or ordinance which at least had some legal color of validity[11] or was attempting to determine and protect its own jurisdiction under circumstances

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[10] As Justice Brennan argued in his concurring opinion in *New York Times* (403 U.S. 725): "The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise." The prohibition against prior restraint even for as little as one day is, under *Near v. Minnesota* and *New York Times, supra,* absolute, except possibly for a narrow range of cases involving the very security of the nation.

[11] In *Walker,* the state court injunction was issued pursuant to an ordinance which involved the use of the city streets. The Court went out of its way to note that (388 U.S. at 315):

> "... this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity. We have consistently recognized

(continued)

where, as this court recognized, the question before the court was neither frivolous nor insubstantial.[12] None of these cases involve an order so patently in violation of the command of the First Amendment, and so completely at odds with the explicit precedents this Court set in *Craig, Estes, and Sheppard, supra,* as is the order here involved.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The need for Supreme Court review of the decision below is highlighted by the fact that the opinion of the Court of Appeals for the Fifth Circuit is directly contrary to an opinion by the Court of Appeals for the Seventh Circuit, *In re Oliver,* 452 F.2d 111 (1971). In that case, an attorney, Frank W. Oliver, intentionally and deliberately violated a rule of a District Court forbidding comments by any lawyer to the media relating to any criminal case before the District Court in the Northern District of Illinois, whether or not such lawyer was involved in such

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[11] (continued) the strong interest of state and local governments in regulating the use of their streets and other public places."

The Court also indicated that a narrow interpretation of the statute might have preserved its validity. See 388 U.S. at 316-17.

In *Howat,* the state court was acting pursuant to state legislation providing for compulsory arbitration, a statute which had not previously been declared invalid or unconstitutional.

[12] In *United Mine Workers,* the court specifically pointed out that the question of jurisdiction involved was one of substance, and plainly was one upon which reasonable men could disagree. See 330 U.S. at 293.

case. The "contumacious" conduct of attorney Oliver consisted of holding a news conference in which he gave various opinions concerning the case of *United States v. Dellinger*, (The Chicago Seven Case), in which he was not an attorney, and another case in which he was an attorney. He was cited for contempt and reprimanded by the District Court for giving his views on the case in which he was a lawyer, but was specifically absolved from any contempt or reprimand for his comments in the *Dellinger* case. 308 F.Supp. 1183 (1970).

The Seventh Circuit Court of Appeals reversed in its entirety the reprimand of the District Court, distinguishing *Walker*, cited supra, and its predecessors, as inapplicable and holding the District Court rule to be invalid as a violation of the First Amendment rights of Frank W. Oliver (452 F.2d at 114-15):

> ". . . it is clear that a rule of court which violates the Constitution or otherwise modifies substantive rights may not stand.
>
> * * *
>
> A blanket prohibition, such as the instant policy statement, against all comment in all cases whether tried before a judge or jury without regard to whether such comment is or even could be prejudicial to the fair administration of justice cannot stand without making a mockery of the free speech guarantee of the first amendment."

The opinion of the District Judge below (see Appendix J., page J. 4) makes clear that he held petitioners in contempt merely because they published the material in violation of his order. He made no attempt to justify his

restraints upon the press in terms of any showing of overriding public need.[13]

Petitioners submit that this Court must make clear that the lower courts cannot follow the path approved by the Fifth Circuit in the instant case.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF STATE SUPREME COURTS

Finally, certiorari should issue because the Court of Appeals decision below is clearly at odds with the decisions of State Supreme Courts faced with the same issue of First Amendment rights. See *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594 (S.Ct. Ariz. 1966); *State Ex Rel. Sup. Ct. of Snohomish Co. v. Sperry*, 483 P2d 608 (S.Ct. Wash. 1971); and *Wood v. Godson*, 485 S.W.2d 213 (S.Ct. Ark., 1972). Each of these cases involve a prior restraint on a newspaper reporter which was violated by the newspaper reporter; in each case the order in question was held to violate the reporter's constitutional rights; and in each case the State Supreme Court, on free speech grounds, prevented the lower court from punishing the reporter for contempt.

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[13] Even in an ordinary contempt proceeding (*i.e.*, one without any question of "prior restraint" on the press), a prerequisite to a conviction is a finding that the alleged contemptuous act is an actual obstruction to the performance of a judicial duty. *Ex parte Hudgings*, 249 U.S. 378 (1919); *In re McConnell*, 370 U.S. 230 (1962); and *In re Little*, 404 U.S. 553 (1972). No such finding was here made.

Clearly, conflicting federal and state court decisions on the question of First Amendment protections cannot be countenanced since it would improperly relegate the protection of First Amendment freedoms to the particular forum used.[14]

CONCLUSION

In sum, the District Court below, through criminal contempt proceedings, attempted to enforce a patently invalid prior restraint upon free press in a manner flatly inconsistent with prior decisions of this Court, contrary to a prior decision of the Court of Appeals for the Seventh Circuit, and inconsistent with interpretations of constitutional protections rendered by numerous State Supreme Courts. If allowed to stand, it would let loose, in the words of Mr. Justice Brennan,[15] "a devastatingly destructive weapon for infringement of freedoms jealously safeguarded not so much for the benefit of any given group of any given persuasion as for the benefit of all of us." It would arm courts with the power to authorize patently impermissible prior restraints on the exercise of First Amendment rights through the use of the "contempt" power and, thus, allow them to accomplish indirectly what the Constitution flatly prohibits them from doing directly.

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[14] Cf. *Case v. Bowles*, 327 U.S. 92 (1946); *Drummond v. United States*, 324 U.S. 316 (1945).

[15] Dissenting in *Walker v. City of Birmingham*, 388 U.S. at 349.

Petitioners submit that such an awesome power has never been authorized by this Court, has in fact been condemned by prior decisions of this Court, and, if the opinion and judgment below are not summarily reversed, then the requested Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX A

THE FIRST OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED AUGUST 22, 1972

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry DICKINSON and Gibbs Adams,
Defendants-Appellants.

No. 71-3469.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1972.

Frank M. Coates, Jr., Baton Rouge, La., for defendants-appellants.

Gerald J. Gallinghouse, U. S. Atty., Mary Williams Cazalas, James D. Carriere, New Orleans, La., for plaintiff-appellee.

Before JOHN R. BROWN, Chief Judge, and BELL and SIMPSON, Circuit Judges.

JOHN R. BROWN, Chief Judge:

The civil libertarians' nightmare with which we here are haunted presents a classic confrontation between "two of the most cherished policies of our civilization"[1]—freedom of the press, encased in the armor of the First Amendment, pitted against the right of the accused to a fair and impartial trial, shielded by the Sixth Amendment and reinforced in this case by a protective order of the District Court which is the real cause of the battle. In the skirmish that ensues, both sides glimpse victory and both sides taste defeat. But the Day of Armageddon has not yet dawned on this great conflict, and accordingly at our hands there is a forced withdrawal to the District Court.

A Prohibited Publication

Cast against a backdrop of assassination and political intrigue, the case began when Frank Stewart, a VISTA worker active in civil rights endeavors on behalf of the black community of Baton Rouge, Louisiana, was indicted in Louisiana State Court on a charge of conspiring to murder the Mayor of Baton Rouge. Alleging that the State Court prosecution was completely groundless and intended solely and exclusively to harass the accused in order to suppress his exercise of First Amendment rights, Stewart, calling on the full arsenal of Federal Civil Rights Statutes, sought to foreclose the pending State criminal prosecution by requesting injunctive relief from the United States District Court for the Eastern District of Louisiana. The District Court de-

1. Bridges v. California, 1941, 314 U.S. 252, 260, 62 S.Ct. 190, 192, 86 L.Ed. 192, 201.

clined to restrain the State Court (Stewart v. Dameron, E.D.La., 1971, 321 F. Supp. 886), but this Court vacated that order and remanded the case for a new evidentiary hearing, since "Stewart had not been allowed to put on any evidence concerning his allegations of bad faith prosecution and harassment" at the original proceeding. Stewart v. Dameron, 5 Cir., 1971, 448 F.2d 396.

In accordance with the mandate of this Court, the District Court held a Younger v. Harris[2] hearing on November 1, 1971, limited solely to the question of whether the State prosecutorial motive was legitimate or contrived. This hearing likewise resulted in a holding for the State, but again the District Court's order was reversed on appeal and the case remanded for another evidentiary hearing. Stewart v. Dameron, 5 Cir., 1972, 460 F.2d 278.

Meanwhile, during the second hearing, the opening shot of the present battle had been fired. Dickinson and Adams, appellants, were newspaper reporters, employed by the City Press and assigned to cover that hearing for the *Morning Advocate* and the *State Times*. During the course of the morning's proceedings the Judge pronounced this order from the bench:

"And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rule in connection with Fair Trial—Free Press provisions, the Rules of this Court,

"It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

"This order is made subject to the sanctions provided by law in the event of any violation of this order.

"Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently, I do not want—and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial—of this hearing."

Notwithstanding that order, and with admitted knowledge that their actions violated its terms, Dickinson and Adams wrote articles for their newspapers summarizing the day's testimony in detail. Accordingly, a show cause order was issued and following a hearing thereon, the District Court found the appellants guilty of criminal contempt for knowingly having violated the November 1 order. Each defendant was sentenced to pay a fine of $300.00. This appeal resulted.

Free Press vs. Fair Trial—Constitutionality Of The Court's Order

[1] The initial question with which we are confronted concerns the constitutionality of the District Court's order. Sympathetic as we are to the legitimate objective earnestly pursued by the conscientious Trial Judge (preservation of an impartial venire within the local community whenever the state criminal prosecution should reach trial), we must conclude that a blanket ban on publication of Court proceedings so far transgresses First Amendment freedoms that any such absolute proscription "cannot withstand the mildest breeze emanating from the Constitution." Southeastern

2. 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669.

Promotions Ltd. v. City of West Palm Beach, 5 Cir., 1972, 457 F.2d 1016, p. 1017.

[2] We start, of course, with the proposition repeatedly reaffirmed by the Supreme Court that "a trial is a public event. What transpires in the courtroom is public property. * * * Those who see and hear what transpired may report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 1947, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546, 1551; Stroble v. California, 1952, 343 U.S. 181, 193, 72 S.Ct. 599, 96 L.Ed. 872, 882; Estes v. Texas, 1965, 381 U.S. 532, 541, 85 S.Ct. 1628, 14 L.Ed.2d 543, 549; Sheppard v. Maxwell, 1966, 384 U.S. 333, 350, 86 S.Ct. 1507, 16 L.Ed.2d 600, 613.[3] Moreover, "reporters of all media * * * are plainly free to report whatever occurs in open court through their respective media." *Estes, supra*, 381 U.S. at 541–542, 85 S.Ct. at 1632.

[3] Particularly is maximum freedom of the press required where the trial is intended to "determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 1962, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569, 580. "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings." *Estes, supra*, 381 U.S. at 539, 85 S.Ct. at 1631. Therefore, "particularly in matters of local political corruption and investigations is it important that freedom of communications be kept open * * *." *Wood, supra*, 370 U.S. at 390, 82 S.Ct. at 1373.

[4] The Younger v. Harris hearing generating the present case, involving as it did allegations of bad faith, harassment, political machinations, and racial motivation on the part of the State prosecutorial officials, was peculiarly one of public concern. In fact, it was precisely the *widespread* interest in the case which led the Court to issue the controversial order. Accordingly, in the circumstances of this case, the prior restraint of the press imposed by the questioned order "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 1963, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584, 593; Organization for a Better Austin v. Keefe, 1971, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1, 6; New York Times Co. v. United States, 1971, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822, 824; Near v. Minnesota, 1931, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. Any less stringent standard would forsake the unequivocal commands of the First Amendment. *Bridges, supra*, 314 U.S. at 263, 62 S.Ct. 190, 86 L.Ed. 192; *Craig, supra*, 331 U.S. at 373, 67 S.Ct. 1249.

[5] Of course, the accused has constitutional rights, too, and particularly important among these are rights to a

3. The principle that Courts may no more censor newsmen than may any other institution of Government finds vindication not only in the literal wording of the First Amendment and interpretating cases, but also in general experience. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on freedom traditionally exercised by the news media for '[w]hat transpires in the courtroom is *public property*.'" *Sheppard, supra*, 384 U.S. at 350, 86 S.Ct. at 1515, *quoted in* Phoenix Newspaper, Inc. v. Superior Court, 1966, 101 Ariz. 257, 418 P.2d 594.

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speedy trial before a fair and impartial tribunal in the venue where the alleged offense occurred. Clearly, pervasive and irresponsible news coverage of a pending criminal proceeding can so inflame and prejudice a community that it becomes virtually impossible to select an impartial jury therefrom. And without a doubt it is the Trial Court's responsibility to protect the defendant from such inherently prejudicial influences which threaten the fairness of his trial and an abrogation of his constitutional rights. *Sheppard, supra; Estes, supra;* Rideau v. Louisiana, 1963, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663. "Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial." Shepherd v. Florida, 1951, 341 U.S. 50, 53, 71 S.Ct. 549, 550, 95 L.Ed. 740, 743 (Jackson, J. concurring).

[6] Thus does Alexander again confront the Gordian Knot. For our history demands that breaches of the unqualified commands of the First Amendment cannot be tolerated and freedom of the press must be given the broadest scope that a liberty-loving people can allow. Pennekamp v. Florida, 1946, 328 U.S. 331, 347, 66 S.Ct. 1029, 90 L.Ed. 1295, 1304;[4] *Bridges, supra.* On the other hand, our fundamental concepts of absolute fairness in trials dictate that the environment within which justice is administered must be maintained unpolluted by the potential infamous notoriety and biased predilections which a completely unfettered but omnipresent press can irrevocably engender in an age of the mass media. *Sheppard, supra; Estes, supra; Rideau, supra.* The balance is delicate with so much at stake, and the equipollence of the interests defies a simple resolution by mere judicial tug-of-war, with the "lesser" bantam liberty giving way to a weightier, more Herculean one. Cf. Karr v. Schmidt, 5 Cir. (en banc), 1972, 460 F.2d 609.

The Clash An Ancient One

But the clash between the First and the Sixth Amendments is by no means endemic only to a modern age of electronic technology and instantaneous dissemination of information. Rather it is a conflict dramatically traced by our history. The District Court, in promulgating his order, relied on the Free Press—Fair Trial Rules for the Eastern District of Louisiana. To perceive why his order overreached those Rules to constitutionally unsupportable extents, it is necessary to understand the historical context in which the Rules came into being.

Our tale begins in 1830 when United States District Judge James H. Peck was tried on Articles of Impeachment for having imprisoned and disbarred one Lawless for publishing a criticism of one of Judge Peck's opinions in a case which was then pending on appeal. Although Judge Peck was eventually acquitted (despite an impassioned prosecution by James Buchanan), Congress acted the very next day to limit severely the Federal Court's power to punish summarily contempt by publication. See Nye v. United States, 1941, 313 U.S. 33, 45–46, 61 S.Ct. 810, 85 L.Ed. 1172, 1179, and Nelles and King, Contempt by Publication in the United States, 28 Col.L.Rev. 401, 409 et seq. for the history of the Judge Peck episode.

The years that followed were marked by a feeling of jealous solicitude for freedom of the press[5] in areas touching

4. "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

5. This is not to say that the press was not subjected to devastating criticism. Consider, for example, the following statement from the letters of Thomas Jefferson as set out in Padover, Democracy, 150–151: "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.

"It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost."

upon the administration of justice. A temporary departure from the previous consistent holdings favoring publication of commentary on court proceedings occurred in 1918 when the Supreme Court in Toledo Newspaper Co. v. United States, 1918, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186, greatly enlarged the District Court's power to punish contemptuous publications by adopting a "reasonable tendency to obstruct the administration of justice" standard for determining whether or not a particular publication was contemptuous. The *Toledo Newspaper* rule proved aberrational, however, and was shortlived. In Nye v. United States, *supra*, it was specifically overruled.

During the very next term after *Nye* the Supreme Court reaffirmed and, in fact, strengthened the *Nye* holding in Bridges v. California, *supra*. In that case, Mr. Justice Black, writing for the majority, engrafted the "clear and present danger" test of *Gitlow* [Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138], *Schenck* [Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470] and *Whitney* [Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095] to the contemptuous publication of court proceeding situation, declaring that even (or perhaps especially within the courtroom context "minor matters of public inconvenience or annoyance [cannot be transformed] into substantive evils of sufficient weight to warrant the curtailment of liberty or expression. * * * [T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges*, *supra*, 314 U.S. at 263, 62 S.Ct. at 194. This zeal in preserving freedom of the press was echoed in *Pennekamp*, *supra*. "We think the specific freedom of public comment should weigh heavily against a possible tendency to influence cases." 328 U.S. at 347, 66 S.Ct. at 1037. And it was again underscored in Craig v. Harney, *supra*. "Those who see and hear what transpired [in open court] can report it with impunity." 331 U.S. at 374, 67 S.Ct. at 1254, 91 L.Ed. 1546.[6]

Problems Of A New Era

At about this time, however, modern technology catapulted the news industry into the electronic age, endowing the press with theretofore unimagined powers of instantaneous dissemination of information, literally to the entire world. With the advent of this capacity for mass communications, the potential of the news media to influence the outcome of court proceedings, long recognized as a likelihood, was finally seen really to be more than theoretical.[7]

Mr. Justice Frankfurter had early warned that press exploitation of court proceedings could so inflame potential jurors that a conviction could not be obtained in the local community consistent with due process. See *Pennekamp*, *supra*, 1946, 328 U.S. at 350, 66 S.Ct. 1029, 90 L.Ed. 1295 (Frankfurter, J., concurring); Maryland v. Baltimore Radio Show, 1950, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562 (Frankfurter, J., dissent-

6. "The history of the power to punish for contempt (see Nye v. United States, *supra*; Bridges v. California, *supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." 331 U.S. at 373, 67 S.Ct. at 1253.

7. Indeed, the charge that inflammatory newspaper articles had prejudiced the defendant's opportunity to secure a fair trial is by no means recent. In the 1807 trial of Colonel Aaron Burr before Chief Justice Marshall, for example, counsel had urged that biased articles carried in the Alexandria *Expositor* and other newspapers had implanted preconceived notions of the defendant's guilt in the minds of the jurors. United States v. Burr, 25 Fed.Cas. pp. 2, 50, Nos. 14692a, 14692e (C.C.D.Va.1807). See also United States v. Holmes, 26 Fed.Cas. pp. 360, 363, No. 15383 (C.C.E.D.Pa.1842). Free Press—Fair Trial, 45 F.R.D. 391, 394, n. 2 (1968).

ing from denial of petition for writ of certiorari); Shepherd v. Florida, *supra*, 1951, 341 U.S. at 50, 71 S.Ct. 549, 95 L. Ed. 740 (Jackson, J., with whom Frankfurter, J., joins, concurring); Stroble v. California, *supra*, 1952, 343 U.S. at 198, 72 S.Ct. 599, 96 L.Ed. 872 (Frankfurter, J., dissenting). That position did not achieve authoritative judicial acceptance, however, until 1959, when, apparently for the first time, the Supreme Court reversed a criminal conviction solely because of prejudicial news articles read by the jurors. Marshall v. United States, 1959, 360 U.S. 310, 79 S. Ct. 1171, 3 L.Ed.2d 1250.

Though that case was decided on supervisory rather than constitutional grounds, the Court two years later invoked the Due Process Clause to invalidate a State murder conviction where continued adverse publicity had created an atmosphere of "sustained excitement," "strong prejudice" and "public passion." Irvin v. Dowd, 1961, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. Shortly thereafter, the Court recognized the inherent impossibility of obtaining an impartial jury in a community where a video tape replay of the defendant's confession had been televised to an estimated 100,000 home viewers. Rideau v. Louisiana, *supra*.

The next few years saw the courts flooded with a torrent of complaints that prejudicial publicity had prevented the convicted defendant from obtaining a fair trial. Over 100 such cases are reported for the brief two-year span from January, 1963 to March, 1965. See R. Ainsworth, Fair Trial—Free Press, 45 F.R.D. 417, 419 (1968). As a result of this flurry of litigation, several federal and local law enforcement agencies, bar associations, national, state and local press groups and judicial conferences convened committees to study the problem and to propose solutions.[8] Despite this intense activity, however, effective measures to curb prejudicial publicity while protecting freedom of the press were virtually non-existent. Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, 399 (1968).

Sheppard v. Maxwell

Such was the situation when, in 1966, the Supreme Court announced its landmark decision in the case of Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600. Sam Sheppard's trial for the murder of his wife had been carnivalized by relentless, irresponsibly over-anxious reporters who displayed a remarkable insensitivity to accuracy, fairness or justice. Before the trial pervasive news coverage had branded Sheppard "a bare-faced liar," a "Jekyll-Hyde" and a "perjuror". A picture of Mrs. Sheppard's bloodstained pillow was "doctored" and then published on the front page of a local newspaper. Much attention was devoted to the extrajudicial claims of a woman convict that Sheppard was the father of her illegitimate child. During the trial, bedlam reigned at the courthouse as hundreds of reporters and photographers jammed the entire courtroom, causing constant confusion, disruption and commotion. A radio broadcast booth was established adjacent to the jury room. Jurymen, witnesses, attorneys and even the Judge were "forced to run the gauntlet of reporters and photographers each time they entered or left the courtroom." 384 U.S. at 355, 86 S.Ct. at 1518. The newsmen exploited the "free reign" which had been allowed them and turned

8. Some of the better known commissions included the Reardon Committee of the American Bar Association's Advisory Committee on Fair Trial and Free Press, the Medina Committee of the Association of the Bar of the City of New York, and the Special Committee of the Board of Directors of the American Newspaper Publishers Association. Additionally, both the Judicial Conference of the United States and the Attorney General of the United States, as well as a multitude of state bar associations and press associations, made in-depth surveys of the problems and proposed partial solutions.

the trial into a "Roman holiday". 384 U.S. at 356, 86 S.Ct. 1507.

Finding that the "state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom," 384 U.S. at 363, 86 S.Ct. at 1522, the Supreme Court ordered a writ of habeas corpus releasing Sheppard from custody. In so holding the Supreme Court laid to rest the notion that the trial court was impotent to protect the defendant from prejudicial influences of an omnipresent press. Indeed the Court suggested a number of ways in which the Courts could "protect their processes from prejudicial outside interferences." 384 U.S. at 363, 86 S.Ct. at 1522. More importantly, the Court in *Sheppard* not only sanctioned efforts to effect this insulation but *demanded* that trial courts adopt "strong measures to insure that the balance is never weighed against the accused." 384 U.S. at 362, 86 S.Ct. at 1522. "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." 384 U.S. at 363, 86 S.Ct. at 1522.

Free Press—Fair Trial Rules

In response to the mandate of *Sheppard*, the Judicial Conference of the United States took action. Its standing Committee on the Operation of the Jury System, headed by Judge Irving Kaufman and a specially appointed Subcommittee to Implement Sheppard v. Maxwell, chaired by Judge Edward Gignoux, undertook two years of deliberations, research and collaboration between the Subcommittee and the full Committee. In 1968 a comprehensive report was published outlining specific recommendations designed to accommodate the news media's right to report with the defendant's right to trial by an impartial jury, all within a framework of constitutional doctrine. See 45 F.R.D. 391 (1968). These recommendations became known as the Kaufman Committee Report.

The Kaufman Committee Report was subsequently adopted by the Judicial Conference of the United States and implemented by Local "Free-Press—Fair-Trial" Rules promulgated by each District Court. The Report and the Local Rules embodying it, however, must be viewed in light of the historically delicate balance the recommendations sought so zealously to preserve. Painstakingly harmonizing history with contemporary realities, freedom of the press with fundamental fairness of trials, the Kaufman Committee explored every aspect of the problem and its Report synthesizes all relevant considerations. The result is a catalogue of explicit proposals, most taken directly from the *Sheppard* opinion, inventorying the tools available to the trial Judge in discharging his affirmative duty to protect the accused from prejudicial publicity and disruptive influences at trial, but carefully avoiding any but the most limited, tangential and indispensable controls on the press.

[7] Indeed, the *Sheppard* opinion had specifically declined to "place any direct limitations on the freedom traditionally exercised by the news media"[9] and had expressly asserted that "of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom."[10] In recognition of those dictates the Kaufman Committee's recommendations deliberately eschew any suggestions for direct control of newsmen except in two very carefully delineated situations—(i) the seating of news media representatives so as to minimize disruptive influences during trial and (ii) the televising, photographing or broadcasting from the courtroom. Other than those exceptions, the Kaufman Committee's recommendations are directed exclusively to parties,

9 384 U.S. at 350, 86 S.Ct. at 1515.

10 384 U.S. at 362-363, 86 S.Ct. at 1522.

witnesses, attorneys, jurors, and courthouse personnel. Of course, the provision for special orders in widely publicized and sensational cases,[11] on which the District Court here relied so heavily, provides great elasticity and room for judicial inventiveness. However, the Report makes clear that this provision was intended to apply only "where necessary to preserve decorum in and around the courtroom and to maintain the integrity of the trial." More importantly, in an effort to insure that the Rule would be invoked only within the framework of constitutionally permissible limits, the Committee went on to identify certain specific subjects to which orders might be addressed. (See § III(c) (1) of Report at 45 F.R.D. 409–411 and Local Rule 10—Subjects of Special Order, note 11, *supra*). Significantly, none of these permissive special provisions includes a suggestion that the content of news reports might be judicially supervised or otherwise controlled, and the local Rule does not undertake to do so. Without so holding—since no such Rule exists—we have grave reservations whether such a limitation could be promulgated without making impermissibly serious inroads into the purview of the First Amendment. Censorship in any form—judicial censorship included[12]—is simply incompatible with the dictates of the constitution and the concept of a free press.[13]

11. "RULE 9. SPECIAL ORDERS

In a widely publicized or sensational case, the Court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and the sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

"RULE 10. SUBJECTS OF SPECIAL ORDER

Such a special order may be addressed to some or all of the following subjects:

(1) A proscription of extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors, and court officials, which might divulge prejudicial matter not of public record in the case.

(2) Specific directives regarding the clearing of entrances to and hallways in the courthouse and respecting the management of the jury and witnesses during the course of the trial to avoid their mingling with or being in the proximity of reporters, photographers, parties, lawyers, and others, both in entering and leaving the courtroom and courthouse, and during recesses in the trial.

(3) A specific direction that the jurors refrain from reading, listening to, or watching news reports concerning the case, and that they similarly refrain from discussing the case with anyone, or with one another, during the trial and from communicating with others in any manner during their deliberations.

(4) Sequestration of the jury on motion of either party or the Court, without disclosure of the identity of the movant.

(5) Direction that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within the environs of the Court.

(6) Insulation of witnesses from news interviews during the trial period.

(7) Specific provisions regarding the seating of spectators and representatives of news media, including:

a. An order that no member of the public or news media representative be at any time permitted within the bar railing;

b. The allocation of seats to news media representatives in cases where there are an excess of requests, taking into account any pooling arrangement that may have been agreed to among the newsmen."

12. "History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publication pertaining to a pending case" *Bridges*, *supra*, 314 U.S. at 268, 62 S.Ct. at 195, 86 L.Ed. 192.

13. Near v. Minnesota, *supra*; Bantam Books, Inc., *supra*; Organization for a Better Austin, *supra*; Chase v. Robson, 7 Cir., 1970, 435 F.2d 1059; State ex rel. Superior Court of Snohomish Cty. v. Sperry, 1971, 79 Wash.2d 69, 483 P.

Now To The Case At Hand

Translating that rich history to the case before us, one significant circumstance is readily apparent—no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court.[14] Indeed, the *Sheppard* opinion, amid a host of suggestions which inevitably limit the press to some extent, specifically and plainly repudiates the notion that the Trial Judge may also bar news reports of public proceedings. "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." 384 U.S. at 362-363, 86 S.Ct. at 1522, 16 L.Ed.2d 600. The Kaufman Committee Report likewise rejects direct influence over the newsmen's domain. "The Committee does not presently recommend any direct curb or restraint on publication by the press of potentionally prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems." [15]

[8] Even if special exigencies might justify curtailment of the right to publish court proceedings in some extraordinary circumstance—and that *if* is a very big one indeed—the present case is peculiarly ill-suited for abandonment of the traditional reluctance of courts to supervise the content of news accounts of public proceedings. In the first place, since the cases make clear that before First Amendment freedoms can be abridged "the substantive evil must be extremely serious and the degree of imminence extremely high," *Bridges, supra*, 314 U.S. at 263, 62 S.Ct. at 194 and that "the fires which [the expression] kindles must constitute an immediate, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil," *Craig, supra*, 331 U.S. at 376, 67 S.Ct. at 1255, 91 L.Ed. 1546, "the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases [particularly in borderline instances]." *Pennekamp, supra*, 328 U.S. at 347, 66 S.Ct. at 1037, 90 L.Ed. 1295. With these guides in mind, it is significant that the hearing here in issue was not before a jury, and trial on the merits was by no means immediate. Nor was there any certainty as to the place of the State Court trial. It is the nature of news that it is so readily forgotten—time can erase impressions, even sensational ones. Thus, while prejudicial news coverage may poison the minds of

2d 608; Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306, 1972.

14. One possible exception to this broad statement may be found by way of dictum in Mr. Justice White's very recent opinion for the Court in Branzburg v. Hayes, 1972, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 that newsmen "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U.S. at 685, 92 S.Ct. at 2658. It seems unlikely that he meant for this dictum to be read too literally, since he immediately cites *Sheppard, Estes* and *Rideau* as support for this proposition. Of course, as we have already pointed out, each of these three cases expressly and explicitly disavows any suggestion that newsmen can be prohibited from publishing reports of what transpires in open court.

15. Footnote 17 of the Report explained, "Both the Reardon and Medina Committees reject an expanded use of the contempt power to control the news media. Because of 'the constitutional problems that would be raised' and 'the inhibitory effect on speech that ought not to be prohibited,' the Reardon Committee proposes the use of the contempt power only, 'when a serious threat to the fairness of an ongoing trial by jury is created by an extrajudicial public statement calculated to affect the outcome of that trial.' Reardon Report, Recommendation 4.1, Proposed Final Draft, p. 27. The Medina Committee is of the view that 'as a matter of both constitutional law and policy, * * * extension of the contempt power is neither feasible nor wise. * * *' (Medina Report, p. 11)."

jurors or immediate prospective jurors for the present, the contamination may be only temporary and while allowing the press possibly to generate an inflamed temper in the community is regrettable, this was no indication that change of venue would not likely suffice. Therefore, the District Court's cure was worse than the disease.

Second, the situation which the trial court faced in the present case was in no way the "Roman holiday"—"carnival atmosphere" created by hundreds of reporters at the Sheppard trial, or the "cause celebre"-show-must-go-on environment of the Estes trial, or the total "bombardment of the community with the sights and sounds of a two-day hearing" at the Rideau trial, for example. The order here covered only two reporters whose in-court conduct was unobtrusive and whose articles appeared deeply buried within the oft-overlooked interiors of the daily paper. Of course this was not the object of the Judge's concern relating to possible prejudice in a future trial at another time and place, but the factor of disruption did not warrant the restrictive measures employed.

Third, the public's right to know the facts brought out in this specific hearing was particularly compelling here, since the issue being litigated was a charge that elected state officials had trumped up charges against an individual solely because of his race and political civil rights activities. "Particularly in matters of local political corruption and investigation is it important that freedom of communications be kept open and that the real issues not become obscured * * *." *Wood, supra*, 370 U.S. 390, 82 S.Ct. 1373, 8 L.Ed.2d 569.

Fourth, while the Court's power over particular conduct committed in his presence within the courtroom is unquestioned, the injunction challenged in this case was not directed at any named party or court official involved in the underlying litigation, but rather it sought to control activities of non-parties to the lawsuit—namely, two reporters—in matters not going to the merits of the substantive issues of the ongoing trial or the court's ability to effectuate any ultimate judgment on them.

[9-11] Fifth, a Federal Court's responsibility to protect a State Court defendant from anticipated unconstitutional influences is generally limited to situations where there is an antecedent showing of bad faith harassment or other special circumstances. Younger v. Harris, *supra*, companion cases and progeny. Since the State Courts are presumed to be no less capable of protecting the defendants' constitutional rights in the context of a pending criminal prosecution than is a Federal Court, Becker v. Thompson, 5 Cir., 1972, 459 F.2d 919, it is generally inappropriate for a Federal Court to attempt by way of anticipation to protect the potential defendant from some possible denial of constitutional right by the State Court. See especially, Perez v. Ledesma, 1971, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701. Although this sensitivity to the accused's rights was laudable both in the sense of protection to the accused and in eliminating the possible generation of deplorable community-wide prejudice, the restrictive measures adopted practically put the Federal Judge in the role of policing the climate of the community to insure a sterile trial in the State Court.

[12] Finally, there are available alternative cures for prejudicial publicity far less disruptive of constitutional freedoms than an absolute ban on publication. Thus, if as the Judge apprehended, the expected pretrial publicity generated a prejudicial atmosphere which had not abated by time for the State trial, the traditional remedies of continuance or change of venue would be readily available to insure a fair trial. The inconvenience or expense to State or defendant in such a course was not enough to justify the extreme ban on publication.

[13] Of course with mass dissemination of news being what it is today there is no way of being positive that

change of venue or postponement by continuance eradicates all prejudice, but with competing values at stake this possibly is not enough. For if allowing the press to publish reports of the proceedings in the present case carried the prospect of poisoning the minds of potential jurors, it likewise offered the promise of administering an antidote against the societal diseases of corruption, oppression and abuse of power by government officials. Enforced silence in the name of preserving the sterility of a future trial can suffocate the First Amendment, particularly when the very issue then on trial is the serious charge of flagrant, wilfull abuse of power. Tabulating this rich history, these factors add up to our compelled conclusion that the District Court's order banning publication of matters transpiring in open court was constitutionally unacceptable, and hence illegal.

It Doesn't End Here

The conclusion that the District Court's order was constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.

[14] We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt. United States v. United Mine Workers, 1947, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884; Howat v. State of Kansas, 1922, 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed. 550; Gompers v. Buck's Stove and Range Co., 1911, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797; Walker v. City of Birmingham, 1967, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210. "People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to wilfully disobey it. * * * Court orders have to be obeyed until they are reversed or set aside in an orderly fashion." Southern Railway Co. v. Lanham, 5 Cir., 1969, 408 F.2d 348, 350 (Brown, C. J., dissenting from denial of rehearing en banc).

It is clear that this principle applies even where the invalidity of the order is of constitutional proportions, as Walker v. Birmingham, *supra*, plainly holds. In *Walker* the contemnors, including Dr. Martin Luther King, had violated an Alabama circuit court ex parte injunction prohibiting participation in street demonstrations planned for the forth coming Easter weekend. Forsaking numerous appellate routes left open for contesting the circuit court's order, the demonstrators marched anyway in knowing disobedience to the injunction and without having taken any judicial steps to dissolve or overturn it. The Supreme Court affirmed the resulting contempt convictions. Admittedly the injunction in *Walker* was merely a judicial paraphrase of an existing municipal ordinance which prohibited street demonstrations without authority of a permit secured from the Commissioner of Public Safety (Eugene "Bull" Conner), which ordinance was shortly declared unconstitutional by a unanimous court in Shuttlesworth v. City of Birmingham, 1968, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162. Nevertheless, the Court, emphasizing that "respect for judicial process is a small price to pay for the civilizing hand of law," 388 U.S. at 321, 87 S.Ct. at 1832, emphatically rejected the suggestion that an individual may disregard a court order simply because the injunction interfered with—albeit impermissibly—his exercise of First Amendment rights. Absent a showing of "transparent invalidity" or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or dissolved of authority by delay or frustration in the appellate process.

regardless of the ultimate determination of constitutionality, or lack thereof.

Uniqueness Of The Judiciary

[15, 16] Admittedly, the inviolability of court orders, typified by the *Walker* rule, is unique among governmental commands. When legislators or executive agencies—State or Federal—have transgressed constitutional or statutory bounds, their mandates need not be obeyed. Violators, or course, risk criminal sanctions if their prediction of illegality should fail, but if the directive is invalid, it may be disregarded with impunity. Shuttlesworth v. City of Birmingham, *supra*; Thornhill v. Alabama, 1940, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. In fact, in certain situations, intentional disobedience to the statute may be the only means of obtaining a judicial determination of its constitutionality. See, e. g., Becker v Thompson, 5 Cir., 1972, 459 F.2d 919; Boyle v. Landry, 1971, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696. Similarly, "one cannot be punished for failing to obey the command of a [police] officer if that command is violative of the Constitution." Wright v. Georgia, 1963, 373 U.S. 284, 291-292, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349, 355.

[17, 18] Likewise, disobedience to a Congressional demand for information cannot be punished as contempt of Congress if the demand was constitutionally infirm. Watkins v. United States, 1957, 354 U.S. 178, 197, 77 S.Ct. 1173, 1184, 1 L.Ed.2d 1273, 1285. And obviously, refusal to submit to an order of induction into the armed forces is not punishable where the order issued in violation of the inductee's constitutional or statutory rights. United States v. Wingerter, 5 Cir., 1970, 423 F.2d 1015.

[19] Significantly, it is only the orders of judicial authorities which must be tested in the courts before deliberate transgression can be excused on an eventual determination that the order was invalid.

The criminal contempt exception requiring compliance with court orders, while invalid non-judicial directives may be disregarded, is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system to work. Judges, after all, are charged with the final responsibility to adjudicate legal disputes. It is the judiciary which is vested with the duty and the power to interpret and apply statutory and constitutional law. Determinations take the form of orders. The problem is unique to the judiciary because of its particular role. Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman.

[20] On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, "while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory." Gompers v. Buck's Stove & Range Co., *supra*, 221 U.S. at 450, 31 S.Ct. at 501, 55 L.Ed. at 809. See also Yates v. United States, 1958, 356 U.S. 363, 78 S.Ct. 766, 2 L.Ed.2d 837; United States v. Fidanian, 5 Cir., 1972, 465 F.2d 755.

No Distinction Between Press and Speech

[21] Appellants do not challenge the *Walker* case or its predecessors. Rather they argue that these cases simply do not apply to injunctions or other judicial orders infringing freedom of the press. No rationale has been offered to justify different treatment where free press instead of free speech issues are at stake, and we perceive no basis for such a distinction. On the contrary, particular language in the recent Supreme Court decision of New York Times Co. v. United States, 1971, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 suggests that that Court would not sanction disobedience of a court order, even where the injunction unconstitutionally restrains publication of news. In the *Times* case, the lower courts had issued temporary restraining orders prohibiting further publication of the Pentagon Papers pending judicial determination of the merits of the Government's objections. Six of the Justices agreed that these injunctions were violative of the First Amendment. Nevertheless, no one suggested that the injunctions could have been ignored with impunity. On the contrary, Mr. Justice Black, with whom Mr. Justice Douglas concurred, vehemently asserted that "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." 403 U.S. at 715, 91 S.Ct. at 2142. Obviously, if the *Times* were free to disregard the unreversed injunctions because of their incompatibility with the First Amendment, the mere presence of impotent and unenforceable restraining orders could not be deemed an ominous immediate denial of First Amendment rights. Mr. Justice Brennan announced an equivalent position. Accordingly, an assumption that courts may punish as contempt violations of even its constitutionally defective orders infringing freedom of the press underlies the *Times* decision.

A Few Inapplicable Qualifications

Of course, the rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy;[16] (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must not require an irretrievable surrender of constitutional guarantees. Regarding (i), there is no problem in this case at all.

Regarding (ii), the Supreme Court made quite clear in *Walker, supra*, that its decision was influenced by the fact that there was a two-day interim between the issuance of the injunction and the planned Good Friday march, during which time some effort to secure judicial relief could and should have been made. However, Mr. Justice Stewart emphasized that "this case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." 388 U.S. at 318, 87 S.Ct. at 1831, 18 L.Ed.2d 1210. If there had been no real opportunity to contest the unconstitutional order, as, for example, if it had been issued at the very moment the march was scheduled to commence, then the premise that effective judicial remedies were available would be undermined and the result would likely have been different.

The "News Is Today's News" Argument—Newsmen Are Citizens, Too

[22] Where the thing enjoined is publication and the communication is

16. See, e. g., In re Green, 1962, 369 U.S. 689, 82 S.Ct. 1114, 8 L.Ed.2d 198; United States v. Cox, 5 Cir. (en banc) 1965, 342 F.2d 167, *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700. (*Cox* was not a criminal contempt case.)

"news", this condition presents some thorny problems. Timeliness of publication is the hallmark of "news" and the difference between "news" and "history" is merely a matter of hours. Thus, where the publishing of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review. But in the absence of strong indications that the appellate process was being deliberately stalled—certainly not so in this record—violation with impunity does not occur simply because immediate decision is not forthcoming, even though the communication enjoined is "news". Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to otherwise unconstitutional mandates nevertheless contemptuous. But newsmen are citizens, too. See Branzburg v. Hayes, *supra*, note 14. They too may sometimes have to wait. They are not yet wrapped in an immunity or given the absolute right to decide with impunity whether a Judge's order is to be obeyed or whether an appellate court is acting promptly enough.

[23] Regarding (iii) it is obvious that if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power. For example, a witness cannot be punished for contempt of court for refusing a court order to testify if the underlying order violates Fifth, Fourth or perhaps First Amendment rights. Malloy v. Hogan, 1964, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Silverthorne Lumber Co. v. United States, 1920, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; Gelbard v. United States, 1972, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179. In each of these cases the unconstitutionality of the court's order served as a valid defense to a charge of contempt. The rationale of these cases is that once the witness has complied with an order to testify he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling the testimony violated constitutional rights. In such a predicament, the damage is irreparable.[17] No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed.

[24] But none of these exculpating factors was present in the case before us. As a matter of jurisdiction (i), the District Court certainly has power to formulate Free Press-Fair Trial orders in cases pending before the court and to enforce those orders against all who have actual and admitted knowledge of its prohibitions. Secondly, as the District Court's findings of fact establish, both the District Court and the Court of Appeals were available and could have been contacted that very day,[18] thereby affording speedy and effective but *orderly* review of the injunction in question swiftly enough to protect the right to publish news while it was still "news". Finally, unlike the compelled testimony

17. Cf. Southern Railway Co. v. Lanham, 5 Cir., 1969, 403 F.2d 119, petition for rehearing en banc denied, 408 F.2d 348.

18. The court order was issued on November 1. It was violated on November 2. On November 15 the defendants were convicted of contempt of court. Until this time defendants had made no effort whatsoever to have the injunction set aside. They had not sought reconsideration by the District Court, appeal, mandamus or any other judicial review of the order. *Thereafter*, on December 1 the defendants filed an application for writ of mandamus in this Court seeking to have this Court order the District Court to vacate the injunction. The response filed by the District Court explained that the order had been dissolved and that the mandamus action was therefore moot. On December 7 a panel of this Court (Judges Wisdom, Coleman and Simpson) denied the petition for writ of mandamus "without prejudice to petitioners' appeal from the criminal contempt convictions." Dickinson and Adams v. West, 5 Cir., No. 71-3202, December 7, 1971 (unpublished order).

situations the District Court's order required that information be withheld—not forcibly surrendered—and accordingly, compliance with the Court's order would not require an irrevocable, irretrievable or irreparable abandonment of constitutional privileges.

[25] Under the circumstances, reporters took a chance. As civil disobedients have done before they ran a risk, the risk being magnified in this case by the law's policy which forecloses their right to assert invalidity of the order as a complete defense to a charge of criminal contempt. Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences[19] for having rebelled at what they deem injustice, but in a manner not authorized by law. They may take comfort in the fact that they, as their many forerunners, have thus established an important constitutional principle—which may be all that was really at stake—but they may not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court.

Retrospective Invalidity Taints Guilty Finding

The fact that the District Court in the circumstances of this case could validly have punished the defendants for contempt of court despite the unconstitutionality of the underlying order still does not dispose of the case. There remains the question whether the conviction should stand in view of the fact that the District Court's action rested on the good faith but mistaken belief that the order was perfectly valid.

[26] Contempt, of course, is a *sui generis* proceeding, and "there is no doubt that a contempt proceeding has play in the joints." United States v. Barnett, 5 Cir. (en banc), 1965, 346 F.2d 99, 107 (Wisdom, J., dissenting). Indeed, contempt may well be the last vestige of the so-called "common law crimes," insofar as a determination that particular conduct should be punished as contempt depends not so much on specific prohibited acts having occurred as on the Judge's subjective determination that the conduct was culpable, blameworthy and deserving of punishment. It may well be that particular conduct is in direct and flagrant disobedience to a court order but the issuing court whose order is violated may nevertheless decide, for whatever reasons, that no sanctions ought to be imposed. See United States v. Barnett, *supra*.

Given that flexibility in contempt cases, an erroneous view regarding the lawfulness of the underlying order may well taint the judgment of contempt. The case of Donovan v. City of Dallas, 1964, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409, is illustrative. In *Donovan* the Texas Court of Civil Appeals had issued a Writ of Prohibition barring certain Federal Court plaintiffs from prosecuting their claims in the United States Court of Appeals for the Fifth Circuit because the issues had already been litigated in the State Courts. The Federal plaintiffs violated this order and were adjudged to be in contempt. When the case ultimately reached the United States Supreme Court, that Court held that the Texas Writ of Prohibition constituted an unlawful deprivation of a Federal Court litigant's rights to pursue Federal appellant remedies. The invalidity of the Texas order, however, did not in and of itself vitiate the contempt convictions. Rather, the Supreme Court remanded the case for a determination by the Texas Court as to whether or not it still would consider the conduct contemptuous, in view of the subsequent pronouncement that the restraining order was unconstitutional. "Whether the Texas court would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court

19. In this case the consequences came relatively painlessly. The defendants were merely fined $250.00 each.

on remand." 377 U.S. at 414, 84 S.Ct. at 1583.

On remand the Texas Court of Civil Appeals determined that the judgments of contempt were inappropriate in view of the Supreme Court pronouncement that the restraining orders were unlawful. Accordingly, the contempt convictions were vacated.

The Tenth Circuit adopted a comparable approach in Dunn v. United States, 10 Cir., 1968, 388 F.2d 511.[20] Following *Donovan* that Court vacated and remanded a contempt conviction for reconsideration in view of the fact that "the District Court acted on the assumption that its order was valid. We have held to the contrary with the result that Dunn is subjected to punishment for disobedience of an invalid order." 388 F.2d at 513. Undeniably, there is no absolute prohibition to such a result ensuing but where the premise (*lawful* order disobeyed) is erroneous, the conclusion (conduct contemptuous) is tainted.

[27] In the case before us the conclusion of contempt was bottomed irrevocably on a mistake of law—"It was the opinion of this Court then and it is its opinion now that the order issued was authorized by [paragraph 9 of the Court's Free Press-Fair Trial] Rule." It was not. Since the determination that the conduct of the respondents was contemptuous was premised on this erroneous view, it is appropriate to remand the case to the District Court for a determination of whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm.

Vacated and remanded.

20. That tortuous case had its start in this Circuit, and it is not over yet. See Koehring Co. v. Hyde Construction Co., 5 Cir., 1963, 324 F.2d 295; Dunn v. Stewart, S.D.Miss., 1964, 235 F.Supp. 955, rev'd sub nom. Stewart v. Dunn, 5 Cir., 1966, 363 F.2d 591; Koehring Co. v. Hyde Construction Co., 254 Miss. 214, 178 So.2d 838, 182 So.2d 580, 184 So. 2d 415; Koehring Co. v. Hyde Construction Co., 253 Miss. 675, 178 So.2d 857; Hyde Construction Co. v. Koehring Co., 10 Cir., 1965, 348 F.2d 613, cert. denied, 1966, 385 U.S. 949, 87 S.Ct. 323, 17 L.

APPENDIX B

THE SECOND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED APRIL 9, 1973

B. 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3275

COURT OF APPEALS
FILED
APR 9 1973
HARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY DICKINSON and GIBBS ADAMS,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Louisiana

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April 9,1973)

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

A prosecution for murder was pending in a state court of Louisiana. An action was brought in the United States District Court for the Middle District of Louisiana to enjoin the prosecution in the state court. A hearing was held in the Federal court. Statements were made with respect to matters which would probably be the subject of testimony in the state court in the event the state court proceeding was not enjoined. The district court with the intent of preventing prejudice to the holding of a fair trial in the state court ordered that no publicity be given by press or otherwise with respect to the substantive statements. The appellants, newspaper reporters,

violated the court's order by writing reports outlining the testimony. They were brought before the district court, a hearing was held, and they were convicted of contempt and fines were imposed. An appeal to this Court was taken and the decision and judgment of this Court was made. The judgment of the district court was vacated and the cause was remanded for further proceedings as directed by this Court's opinion. United States v. Dickinson and Adams, 5th Cir. 1972, 465 F.2d 496. On remand the district court made further findings and adhered to and confirmed its finding of willful contempt and adhered to the penalties previously imposed. The newspaper reporters have again taken their appeal to this Court.

We do not have on this appeal any issue of free press-fair trial. The determination which we make is that the prior opinion and decision of this Court established the law of the case from which we do not depart. Orderly judicial procedure requires that there be an adherence to a decision upon an earlier appeal of the same case. William G. Roe & Co. v. Armour & Co., 5th Cir. 1969, 414 F.2d 862; White v. Murtha, 5th Cir. 1967, 377 F.2d 428; Rachal v. Allen, 5th Cir. 1967, 376 F.2d 999; Lumbermen's Mutual Casualty Co. v. Wright, 5th Cir. 1963, 322 F.2d 759. Although the Court has power to adopt a position different from that of the earlier appeal, we are not persuaded that such action is required in this cause. It is to be noted that the appellants did not seek a rehearing or make application for certiorari of the decision on the prior appeal.

The judgment of the district court is

AFFIRMED.

APPENDIX C

ORDER OF DISTRICT JUDGE E. GORDON WEST FORBIDDING REPORT OF TESTIMONY TAKEN IN OPEN COURT

And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rule in connection with Fair Trial - Free Press provisions, the Rules of this Court,

It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

This order is made subject to the sanctions provided by law in the event of any violation of this order.

Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently, I do not want -- and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial -- of this hearing.

APPENDIX D

NOTICE AND ORDER TO GIBBS TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CRIMINAL CONTEMPT, ISSUED NOVEMBER 2, 1971

NOTICE AND ORDER TO SHOW CAUSE

On Monday, November 1, 1971, this Court was in the process of holding a hearing in open court, to determine whether or not a preliminary injunction should issue in a pending State Court criminal proceeding against the plaintiff herein. This hearing was in the nature of a hearing to determine whether or not probable cause existed to warrant said prosecution. Shortly after the hearing commenced, this Court issued an order, in open court, and in the presence of newsmen present, including one Gibbs Adams, reporter for the Morning Advocate of Baton Rouge, Louisiana, enjoining and forbidding the newsmen present from causing to be published the details of the evidence adduced at this hearing. They were specifically authorized to report that the hearing was being held, but enjoined from publishing the details of the evidence. This order was entered pursuant to this Court's published rule concerning Free Press-Fair Trial, and was entered after explaining, in open court, that it was, in the opinion of the Court, necessary in order to preserve the integrity of the pending State Court criminal proceedings. The Court stated that it believed, absent this order, both the State and the defendant would be seriously prejudiced and the empanelling of a jury in East Baton Rouge Parish would be made more difficult if not impossible.

Despite this order, the said Gibbs Adams, intentionally, and knowingly, caused to be published in the Morning Advocate, on the morning of November 2, 1971, a detailed report of the evidence heard in open court, and then, in utter contempt of the order of this Court, recited in the article the fact that he had been ordered by the Court not to cause this evidence to be published.

Now, therefore, IT IS ORDERED that Gibbs Adams show cause, if any he can, on Monday, November 8, 1971, at 9:00 o'clock a.m., why he should not be held in criminal contempt of the Court and punished accordingly.

IT IS FURTHER ORDERED that a copy of the Notice and Order be served upon the said Gibbs Adams in accordance with law.

Baton Rouge, Louisiana, November 2, 1971.

E. Gordon West

UNITED STATES DISTRICT JUDGE

APPENDIX E

NOTICE AND ORDER TO LARRY DICKINSON TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CRIMINAL CONTEMPT, ISSUED NOVEMBER 2, 1971

NOTICE AND ORDER TO SHOW CAUSE

On Monday, November 1, 1971, this Court was in the process of holding a hearing in open court, to determine whether or not a preliminary injunction should issue in a pending State Court criminal proceeding against the plaintiff herein. This hearing was in the nature of a hearing to determine whether or not probable cause existed to warrant said prosecution. Shortly after the hearing commenced, this Court issued an order, in open court, and in the presence of newsmen present, including one Larry Dickinson, reporter for the State Times of Baton Rouge, Louisiana, enjoining and forbidding the newsmen present from causing to be published the details of the evidence adduced at this hearing. They were specifically authorized to report that the hearing was being held, but enjoined from publishing the details of the evidence. This order was entered pursuant to this Court's published rule concerning Free Press-Fair Trial, and was entered after explaining, in open court, that it was, in the opinion of the Court, necessary in order to preserve the integrity of the pending State Court criminal proceedings. The Court stated that it believed, absent this order, both the State and the defendant would be seriously prejudiced and the empanelling of a jury in East Baton Rouge Parish would be made more difficult if not impossible.

Despite this order, the said Larry Dickinson, intentionally and knowingly, caused to be published in the State Times, on the evening of November 1, 1971, a detailed report of the evidence heard in open court, and then, in utter contempt of the order of this Court, recited at the end of his article the fact that he had been ordered by the Court not to cause this evidence to be published.

Now, therefore, IT IS ORDERED that Larry Dickinson show cause, if any he can, on Monday, November 8, 1971, at 9:00 o'clock a.m., why he should not be held in criminal contempt of the Court and punished accordingly.

IT IS FURTHER ORDERED that a copy of the Notice and Order be served upon the said Larry Dickinson in accordance with law.

Baton Rouge, Louisiana, November 2, 1971.

UNITED STATES DISTRICT JUDGE

APPENDIX F

TRANSCRIPT OF REASONS OF DISTRICT JUDGE E. GORDON WEST FOR FINDING DICKINSON AND ADAMS GUILTY OF CRIMINAL CONTEMPT

Well, gentlemen, let me commence by saying that an order of this Court was issued in connection with the case of Frank Stewart versus Charles H. Dameron, which hearing was a preliminary hearing preparatory to possible or probable or almost certain criminal proceedings in State Court. The order which the Court issued was clear and unambiguous, and, of course, there was no question raised then nor is there a question raised now as to the jurisdiction, as such, of this Court. The Court had jurisdiction to hear the matter involved and had jurisdiction to enter the order -- to enter an order or to enter orders in connection with that case and the hearing being held before this Court. And I certainly don't understand the respondents' claim that the Court had no jurisdiction to enter orders in the proceedings. The question is whether or not the order issued was a valid order and secondly whether or not respondents had a right to violate it whether it was a valid order or invalid order.

The respondents, Larry Dickinson and Mr. Gibbs Adams, by their own admissions in the response filed to this show cause order, admit, of course, that they wilfully violated the order; and it is further obvious that they violated

the order without in any way attempting to have this order either modified or set aside or reviewed in proper judicial proceedings. The hearing on that day terminated at five minutes of twelve. There was ample time for anyone who thought that there was any invalidity attached to the order issued by this Court to have its validity properly tested judicially.

After the first violation which was the publication of an article by Mr. Dickinson, Mr. Gibbs announced that he had to either, quote, "go to jail or leave my job", end quote, and since the first article had been published, that he would be impelled to publish an article also in the morning paper.

In each of the articles published, there was a statement under the byline of these respondents, notifying the public that they had been ordered not to publish these details, which in the opinion of this Court can only be considered as an announcement to the public of the respondents' contempt for the court order.

In spite of the present allegations of the respondents that no trial was imminent, criminal trial is imminent, and had they done their homework they would have known that trial is imminent because of the fact that the prescriptive period on the criminal charges is about to run. Therefore the Court was well aware of the fact that a criminal trial was imminent in this case at the time it issued its order, and that widespread publicity about the details involved

would constitute a serious threat to the fair trial of the defendant in that criminal trial.

This Court tried to preserve freedom of the press and the freedom of the public to be present while at the same time preserving the rights of the litigants to a fair trial. No great damage in the context of jury selection and criminal trial could have been done, in the opinion of this court, by having the small handful of spectators present who were present that day in this courtroom. Nor could damage have been done by allowing the press to be present and by having no restriction on a general reporting that the hearing had been held; but it was the opinion of this Court, at that time as it is the opinion of this Court now, that great prejudice to the litigants would result from widespread dissemination by the press of the details of the preliminary hearing that was being held before this Court.

If all of the spectators present had gone out and told all of their friends what had happened in this court it would not have seriously impaired the jury selection in the pending criminal case; but one publication in the State-Times or the Morning Advocate of the details involved in that hearing, would make the selection of the jury not only difficult, but probably impossible.

The newspaper constantly talks about the rights of the public and the rights of the people and how the courts

have to protect those rights. I believe the newspaper has the same obligation to protects the rights of the same people it expects the Courts to protect.

At the time this order was handed down, this Court was well aware of the fact that in two very recent cases, fresh in the minds of all of us, trials had to be transferred one as far away as Montana, and another one as far away as Houston, Texas, despite the fact that the Constitution of the United States provides that criminal trials shall be held at the place where the crime is committed. But due to publicity such as would result from a reporting of the details of the evidence in this case, it became impossible to try those cases anywhere close to the area where the crime was committed, and to the area where the public has the right to have the trial held.

I'm aware of the newspaper's attitude that the public has a right to know; but the public has a right to something else, they have Constitutional rights also, and one is to have trials held in the vicinity where the crime is committed if at all possible.

Paragraph seven of this Court's rule pertaining to free press-fair trial, says that nothing in these rules is intended to preclude formulation or application of more restrictive rules relating to release of information about juveniles or other offenders.

Paragraph nine of the Rules permits the Court to issue such orders as it may deem appropriate in order to protect the rights of the accused. The Court in this case tried desperately to balance the rights of the press with those of the accused. Hence the order in question was issued. It was the opinion of this Court that a responsible press would certainly cooperate to the extent of assisting in balancing these rights. Nobody's rights were intended to be violated. On the contrary, the rights of everyone were, in the opinion of this court, and to the best of its ability -- or would have been protected by this order.

If respondents felt that this order was so illegal or so improvidently issued, they could have contested that order; they could have contested it by legal means. They chose instead to take it upon themselves to judge its validity and then to deliberately disobey it, and give notice to the world that they were doing so.

It is the opinion of this court that such action on the part of the respondents did, in fact, constitute a contempt of the order of this court.

Would you please rise?

[The respondents rose and faced the Court.]

THE COURT:

It is therefore adjudged and decreed that the respondents, Larry Dickinson and Gibbs Adams, be and they

are hereby held in contempt of court.

It is further ordered -- It is further the judgment of this Court that they each pay a fine to the United States of America in the sum of three hundred dollars.

It is the further order of this Court that the respondents stand committed for the payment of the fine.

Court will be at recess.

APPENDIX G

JUDGMENT OF CONVICTION AGAINST GIBBS ADAMS OF CRIMINAL CONTEMPT AND IMPOSITION OF FINE OF $300

JUDGMENT & COMMITTMENT (Rev. 2-68)

United States District Court

FOR THE

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED
NOV 8 1971
BENJAMIN W. REISCH
CLERK

Cr. Form No. 25

United States of America

v.

No. 71-85

GIBBS ADAMS

On this 8th day of November , 1971 ~~xxxx

APPENDIX H

JUDGMENT OF CONVICTION AGAINST LARRY DICKINSON OF CRIMINAL CONTEMPT AND IMPOSITION OF FINE OF $300

H. 2

JUDGMENT & COMMITMENT
(Rev. 2-68)

United States District Court

FOR THE
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Cr. Form No. 7
FILED
NOV 8 1971
BENJAMIN W. REISCH
CLERK

United States of America

v.

LARRY DICKINSON

No. 71-85

On this 8th day of November , 1971 ~~the attorney for the~~ the defendant appeared in person and[1] with counsel, F. W. Middleton, Jr., Esq. and Frank Coates, Jr., Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] NOT GUILTY and a finding of GUILTY by the Court

has been convicted of the offense of criminal contempt of the Court's order of November 1, 197 issued in the case of Frank Stewart vs Charles H. Dameron, District Attorney ad hoc, etc., et al, Civil Action No. 70-131, and in furtherance of the Free Press Fair Trial Rule of Court in effect in the Eastern District of Louisiana

as charged[3] by the Court

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby ~~committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of~~ fined the sum of THREE HUNDRED DOLLARS ($300), to stand committed for non-payment.

NOTICES MAILED TO:

IT IS ADJUDGED that[5]

By

FEE
PROCESS
CHANGE
INDEX
ORDER
HEARING
DOCUMENT NO.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge

The Court recommends commitment to[6]

BENJAMIN W. REISCH
Clerk

[1] Insert "by (name of counsel), counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. [2] Insert (1) "pleas" and the court found [illegible] there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a verdict of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "as charged," if applicable. "Under (1) a plea of guilty, (2) a verdict of guilty, (3) which counts are to run concurrently or consecutively and, if consecutively, which ones are to begin with reference to the termination of prior terms or any other unexpired sentence, whether imposed by this court or by another court, to be served before the commencement of the sentence imposed by this judgment. [4] Insert any order with respect to the payment of costs or the giving of bail or to any other matter not covered by the judgment.

APPENDIX I

WRITTEN OPINION OF JUDGE E. GORDON WEST STATING REASONS FOR HOLDING RESPONDENTS GUILTY OF CRIMINAL CONTEMPT, ISSUED NOVEMBER 10, 1971

REASONS FOR JUDGMENT HOLDING RESPONDENTS,
LARRY DICKINSON AND GIBBS ADAMS,
IN CRIMINAL CONTEMPT OF COURT

This matter came on for hearing on an order issued to respondents, Mr. Larry Dickinson and Mr. Gibbs Adams, to show cause why they should not be held in criminal contempt of this Court. At 10:00 a.m. on Monday, November 1, 1971, this Court commenced a hearing in open court to determine whether or not a preliminary injunction should issue enjoining further proceedings in a pending State Court criminal case against one Frank Stewart, plaintiff herein. This hearing was not one on the merits, but was, instead, a hearing to determine whether or not the proposed State Court proceeding was in fact a good faith prosecution. The pending State Court prosecution was based upon a very serious charge involving an alleged conspiracy to assassinate several public officials. This Court had previously refused to issue the requested preliminary injunction and upon appeal to the Fifth Circuit Court of Appeals, the case was remanded for the taking of additional testimony. Shortly after this hearing commenced it became apparent that the nature of the testimony being produced was such that widespread dissemination thereof would

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in all probability, render the selection of an impartial jury in the Parish of East Baton Rouge difficult, if not impossible. This Court had recently experienced two similar situations wherein it was necessary, because of an abundance of newspaper publicity, to ultimately transfer one case to far off Montana, and another to Houston, Texas for trial. Since there were very few spectators in the courtroom, the Court concluded that no appreciable prejudice could result from continuing the hearing as an open hearing, but that widespread dissemination by the news media of the details of the testimony could and in all probability would seriously and adversely affect the pending criminal proceedings. Thus, in order to preserve to the fullest extent possible the rights of those persons present, while at the same time protecting the right of the accused to be tried by an impartial jury at the place where the crime was allegedly committed, this Court, pursuant to what it believed to be its authority under the "Free Press-Fair Trial" rule adopted by the Court on September 19, 1969 pursuant a resolution of the Judicial Conference of the United States, issued an order in open court and in the presence of the newsmen present, enjoining and forbidding the newsmen present from causing to be published the details of the evidence adduced at the hearing. The order specifically authorized the newsmen to report that the hearing was being held and it did not preclude them from reporting the names of those who participated. It only prohibited a publication of the details of the testimony given. This order was issued pursuant to the provisions of Paragraph 9 of this Court's Free Press-Fair Trial rule which authorizes the Court

to issue special orders covering such matters as the Court may deem necessary and appropriate in order to protect the interests of the accused and to protect his right to a fair trial by an impartial jury. It was the opinion of this Court then and it is its opinion now that the order issued was authorized by that rule. The order was carefully drawn in such a manner as to protect, as far as possible, the First Amendment right of freedom of the press while at the same time balancing that right against the right of the accused to a fair trial by an impartial jury at the place where the crime was allegedly committed. It was the Court's opinion that this order was preferable to one which would have closed the hearing completely to all newsmen and spectators.

After the order was issued, at approximately 10:30 a.m., the hearing continued without any objection from the newsmen present, and particularly without objection from respondents herein, Mr. Larry Dickinson, reporter for the State Times and/or Mr. Gibbs Adams, reporter for the Morning Advocate in Baton Rouge, Louisiana. Court wps recessed at 11:55 a.m. and the hearing was not to resume until 9:00 a.m. the following day. No effort was made that day, or at any other time, by either respondent to set aside the order, despite the fact that they had all afternoon in which to have contacted either this Court or the Court of Appeals had they wished to do so. To the knowledge of these reporters, the Fifth Circuit Court of Appeals has a standby panel to handle emergency matters such as this. Instead, respondent, Larry Dickinson, proceeded to cause to be published that evening in the State Times, a Baton Rouge newspaper

of wide circulation, a most detailed report of the testimony taken in Court, and then proceeded, in a display of utter contempt, to conclude his article with a statement to the effect that he had been ordered by the Court not to publish this testimony. Respondent Gibbs Adams, a reporter for the Morning Advocate, another Baton Rouge newspaper of wide circulation, then announced to some of the court personnel that since Mr. Dickinson had defied the court order, that he also would have to publish the same story in the Morning Advocate because he had to "either go to jail or lose my job." He proceeded to cause to be published a similar detailed story also stating therein that he had been ordered by the Court not to publish the details of the testimony. After the articles appeared in the two papers, this Court issued an order to both Mr. Dickenson and Mr. Adams to show cause why they should not be held in criminal contempt of this Court. The hearing was held on that show cause order on November 8, 1971. Both respondents readily admitted that they were aware of the court order and there was no question raised as to the jurisdiction of the Court over the subject matter of the case which it was hearing. The only defense offered is that the order of the Court was an invalid order which encroached upon respondents' First Amendment rights to freedom of the press. No excuse has been offered for respondents' failure to attempt to judicially question the validity of the order. The good faith of the Court in issuing the order has not been questioned. The defense is simply that if respondents believed the order impinged upon their First Amendment rights, they were not obliged to obey it. In other words, respondents conclude

that they have the right to be the sole judge of the validity of such an order and that resort to the Courts for a determination of the order's validity is not required. After hearing the defense, the Court found both respondents in criminal contempt of court and imposed a fine of $300 each. Notice of appeal was thereafter filed by both respondents.

In formulating the order complained of, this Court tried desperately to balance respondents' First Amendment rights against the rights of the accused to a fair trial by an impartial jury. A criminal trial was not something on the far distant horizon as has been intimated by counsel for respondents. The trial is imminent. The Court order was not "transparently invalid" and it certainly had more than a "frivolous pretense to validity." See Walker v. City of Birmingham, 388 U.S. 307, 316, 87 S.Ct. 1824, 1829 (1967). If respondents doubted the validity of the order, they could have first objected to the order, which they did not, and then they could have and should have tested its validity by orderly court procedure rather than on an ex parte judgment of their own. There was ample time for respondents to have done this. Instead, they chose to deliberately, knowingly, and willfully defy the Court's order and then announce to the world that they had done so. This, in the opinion of this Court, was contemptuous action. As was stated in Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 450, 31 S.Ct. 492, 501 (1911):

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."

In United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677 (1947), the Court had issued a temporary restraining order which the defendants chose to ignore because they believed the order denied them their constitutional right to strike. In upholding a contempt conviction, the Court said at page 293:

> "The defendants in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt."

Further, the Court quoted with approval from Howat v. State of Kansas, 258 U.S. 181, 190, 42 S.Ct. 277, 281 (1922):

> "It is for the Court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

In the case of Walker v. City of Birmingham, supra, petitioners planned to hold a civil rights march in the City of Birmingham. City officials obtained an injunction from the State Court, but petitioners willfully violated the injunction. They were held in contempt by the Courts of Alabama. In affirming the contempt conviction, the United States Supreme Court had this to say:

> "The Supreme Court of Alabama, finding that the trial court had jurisdiction, applied the same rule of law which was followed here:
>
> > "'As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the

> decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree * * * .'
> * * *
>
> "These precedents clearly put the petitioners on notice that they could not by-pass orderly judicial review of the injunction before disobeying it. * * *
>
> "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." 388 U.S. at 320, 321.

For these reasons, it was, and is, the opinion of this Court that respondents Larry Dickinson and Gibbs Adams, by their intentional and willful defiance of an order of this Court, without in any way resorting to orderly legal process to have that order modified or set aside, were guilty of criminal contempt, and the Court so held.

Baton Rouge, Louisiana, November 10, 1971.

E. Gordon West

UNITED STATES DISTRICT JUDGE

APPENDIX J

WRITTEN OPINION OF JUDGE E. GORDON WEST STATING REASONS FOR HOLDING RESPONDENTS GUILTY OF CRIMINAL CONTEMPT AFTER REMAND, ISSUED OCTOBER 10, 1972

Confirmation of judgment of contempt

Defendants, Larry Dickinson and Gibbs Adams, were held in criminal contempt of this Court and fined the sum of $300 each. The conviction of contempt resulted from the defendants' knowingly, intentionally, and willfully violating an order of this Court. Prior to their intentional and pre-announced violation of the Court's order they made no effort to obtain a judicial determination of the validity of the Court's order despite the fact that two or more avenues were open and available for them to do so. Following their conviction, they appealed to the Fifth Circuit Court of Appeals and that Court subsequently held that the order which had been disobeyed by the defendants was constitutionally infirm and was thus an invalid order. But in the course of their opinion the Court of Appeals, after recognizing the well established rule of law that as a general rule invalid as well as valid orders of Court must be obeyed unless and until judicially set aside, said:

> "Of course, the rule that unconstitutional court orders must nevertheless be obeyed until set aside pre-supposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must not require an irretrievable surrender of constitutional guarantees."

The Court then proceeded to find that all of these conditions most certainly existed in this case and concluded that:

> "Under the circumstances, reporters took a chance. As civil disobedients have done before they ran a risk, the risk being magnified in this case by the law's policy which forecloses their right to assert invalidity of the order as a complete defense to a charge of criminal contempt. Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law. They may take comfort in the fact that they, as their many forerunners, have thus established an important constitutional principle -- which may be all that was really at stake -- but they may not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court."

But after making this positive finding, the Court of Appeals remanded the case to this Court for reconsideration and for a determination of "whether the Judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm." In view of the positive findings of the Court of Appeals, with which views I wholeheartedly agree, it would be too great a contradiction for me, on the one hand, to recognize the principle approved by the Court of Appeals that "Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law," and at the same time hold that because the order, issued in utter good faith by this Court, was subsequently held by another Court to be constitutionally infirm, the defendants should not

suffer the consequences for "having rebelled at what they deem injustice, but in a manner not authorized by law." I deem it inappropriate in this case for me to try to imitate the proverbial catfish who could talk out of both sides of his mouth and whistle all at the same time.

Furthermore, the Court of Appeals mistakenly concludes that "the conclusion of contempt was bottomed irrevocably on a mistake of law." On the contrary, the conclusion of contempt was bottomed on the very law recognized, approved, and reiterated by the Court of Appeals in this very case, i.e., that the defendants may not assert invalidity of the order as a defense to the charge of criminal contempt in this case; that having disobeyed the Court's decree they must, as civil disobayers, suffer the consequences, and that they may not now "escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court."

It was not the fact that this Court then and now believes that its order was a valid one that alone gave rise to the contempt citation. It was the fact that these defendants, rather than seek an available judicial review of the Court's order, decided instead to announce to Court personnel that they were going to violate the order and then, after violating the order, contemptuously announced to the public, at the end of their published articles,

that they had published this story despite an order of Court ordering them not to do so. It was primarily this public display of utter contempt for this Court's order that prompted the contempt citation. The defendants, as noted by the Court of Appeals, may "not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court." Of course this Court was of the opinion that its order was a valid one. It would be difficult to conceive of a court issuing an order, knowing it to be invalid, and then having the audacity to cite a person for contempt for disobeying it. The very purpose of the law which has been cited with approval by the Court of Appeals, and under which a person must suffer the consequences for willfully and intentionally disregarding a court order, is to protect the integrity of court orders, issued in good faith, unless and until they are judicially determined to be invalid. At the time of the contempt citation, it was not the validity vel non of the Court's order that was primarily at issue. It was the intentional, willful, flagrant and contemptuous disregard of the Court's order before in any way attempting to have the order, which was obviously issued in good faith, judicially reviewed. It was upon this action, rather than a mistake of law, that the contempt citation was bottomed.

For these reasons, the conviction of the defendants for criminal contempt of Court, and the fines heretofore imposed, must remain unchanged.

Baton Rouge, Louisiana, October 10, 1972.

UNITED STATES DISTRICT JUDGE

APPENDIX K

NEWSPAPER ARTICLE BY LARRY DICKINSON IN BATON ROUGE STATE TIMES, NOVEMBER 1, 1971

20-A, STATE TIMES , Baton Rouge, Monday, November 1, 1971

Two Officers Give Testimony In Plot Hearing

By LARRY DICKINSON

Two Baton Rouge policemen testified in U.S. District Court here this morning that political motivations did not enter an investigation into an alleged plot to assassinate Mayor-President Dumas and other political figures.

The testimony was given at a hearing before U.S. Dist. Judge E. Gordon West on a petition seeking to halt the state court prosecution of Frank Stewart, a young Negro leader charged with conspiracy to murder Dumas.

Both the police officers, Capt. Leroy Watson and Lt. Herbert Garrison, said the fact the suspects were engaged in civil rights activities did not enter into the investigation.

Watson said information about the alleged assassination plot came from a paid informant, James Lee (Tiny Tim) Moore. He said Moore came to him March 11, 1970, and told him that five people had held a meeting at which the assassination of several political figures was discussed.

Moore identified the persons who attended the meeting as Stewart, Alphonse James Snedecor, Wade Hudson Jr., Jody Bibbens and an unidentified woman, Watson said. The victims of the alleged plot were identified as Dumas, Baton Rouge Police Chief E. O. Bauer, Dist. Atty. Sargent Pitcher and Plaquemine Police Chief Dennis Songy, he said.

Watson told of instructing Garrison to set up a tape recorder in Moore's car to obtain additional information about the plot, and sending Garrison to photograph the site.

Watson said he checked into the background of Stewart, Hudson and the others after receiving the information they were involved, and said he got information that Stewart or Bibbens had at one time gone to New Orleans to pick up H. Rap Brown and bring him to Baton Rouge in a car belonging to Stewart's father.

His office "had a little knowledge of SOUL," a civil rights organization to which Stewart and some of the others belonged, Watson said, but had not investigated the organization.

Watson told of briefing Dumas twice on the investigation. He said it was felt at the time that the investigation should proceed, without making immediate arrest, in order to obtain better evidence against those involved in the plot.

Under questioning by Judge West, Watson said there was nothing to make him believe that the arrest and prosecution was for political motives or harassment or that it was in any way connected with SOUL and Stewart's civil rights activities.

Garrison testified about setting up the tape recorder in Moore's car. He said tapes of three conversations were obtained from the recorder.

In questioning both Garrison and Watson, Stewart's attorney attempted several times to delve into the content of the recordings, but Judge West would allow only limited questioning about Stewart's involvement as related on the tapes.

West earlier had listened to the tapes in his chambers and had ruled that the grand jury which indicted Stewart had sufficient evidence on which to do so.

While Garrison was being questioned about the recordings, Judge West interrupted the proceedings to order newsmen about the case then to advertising in the courtroom not to publish any testimony given during the hearing.

Judge West said he issued the order to avoid undue publicity which would in any way interfere with the rights of any of the litigants, and that newsmen publishing the testimony would be subject "to the sanctions provided by law."

West said the press could report that the hearing was held, but could not publish any of the testimony. He said publication of the testimony might impede the progress of the selection of a jury to hear the trial of the case.

The two Baton Rouge policemen were the only witnesses to take the stand this morning. The hearing was recessed by Judge West shortly before noon today until 9 a.m. tomorrow.

Stewart's attorney, in seeking to introduce additional testimony about Moore and his role in the investigation, said he wanted to show that Moore had a motive other than informing the police about a crime.

He said Moore was a paid police informant who was indicted to infiltrate SOUL and see that its leaders were arrested.

Judge West refused to allow questions on this line, contending that these were questions which could be answered in a state court trial of the case. He said the attorney's allegations were merely defenses to the criminal charge against Stewart.

Judge West refused to enjoin the state court prosecution in February after hearing the tape recordings, but the U.S. 5th Circuit Court of Appeals ordered him to hold an evidentiary hearing on whether the prosecution was motivated by the civil rights activities of the accused men.

APPENDIX L

NEWSPAPER ARTICLE BY GIBBS ADAMS

Stewart Case Hearing Slated To Continue Before U.S. Court

By GIBBS ADAMS

U.S. Dist. Judge E. Gordon West will continue a hearing at 9 a.m. Tuesday as to whether the prosecution of Frank Stewart, a young Negro who is charged with conspiracy to murder Mayor-President Dumas, was motivated by political considerations or because of Stewart's civil rights activities.

Two city police officers were heard Monday in court, rehashing much of the information concerning the police investigation that has been known for months.

West blocked questions by Stewart's attorney, Benjamin Smith of New Orleans, aimed at discovery of what three tape recordings of conversations among the alleged conspirators reveals. He heard the tapes in chambers earlier this year before ruling the state could proceed with the prosecution of Stewart.

But, the U.S. Fifth Circuit Court of Appeals ordered him to hear further testimony as to whether the prosecution is a bad faith prosecution by local authorities. And, Judge West emphasized that's all he's concerned with in the hearing, noting he has already held that the tapes themselves indicate good faith prosecution.

Capt. Leroy Watson, head of the city police intelligence division, and Lt. Herbert Garrison, an intelligence officer, were the only two witnesses to be heard Monday between 10 a.m. and noon when West recessed the hearing until 9 Tuesday.

At one point, Judge West expressed concern over prejudicial pre-trial publicity in the case and ordered newsmen among some 60 spectators in the courtroom not to report details of the testimony. He expressed concern that reporting might prejudice the selection of a jury in state court.

Stewart seeks to enjoin his prosecution in state court, contending his activities as president of SOUL, a black organization, motivated the charges against him.

Watson said James Lee Moore, a police informer, told him March 11, 1959, of overhearing Stewart, Alphonse Snedecor, Wade Hudson, Jody Hibbens and a known Moore didn't know plan in a meeting at Stewart's home to assassinate Mayor-President Dumas, Police Chief Eddie Bauer, Det. Sgt. L. Peter Jr. and Plainclothesman Frank Sorey.

Both he and Garrison told of rigging Moore's car with recording devices the following morning and receiving three tapes of conversations between Moore and one or more of the alleged conspirators.

Stewart and Snedecor are the only ones charged by the state.

Watson said he believed Moore, known as "Tiny Tim," to be a reliable informant and said he had made "busts" (arrests) based on information Moore supplied earlier.

By Friday of that week in March, 1959, Watson informed the mayor-president of the alleged plot and suggested he take a different route to and from work. The following Sunday, he and Garrison went to the mayor's home and the mayor summoned Pitcher, Sheriff Clemmons and Chief Bauer. The result of that meeting, the witnesses indicated, was assignment of investigators from other agencies to help keep surveillance in the case.

Both Watson and Garrison, under questioning by Judge West, said they knew of no political considerations or special effort by the police to nab Stewart because of his civil rights activities.

In fact, Watson testified, he knew very little about SOUL when he first received Moore's report, but felt the information "was well worthwhile not ignoring."

He instructed Moore to transport Snedecor and both he and Garrison told of surveying the scene at La. 19 and Old Rafe Mayer Road where the alleged conspirators planned to shoot Dumas, according to the state's contention.

Watson acknowledged he gave Moore $40 to put up to buy a rifle and ordered to the sign at SOUL headquarters pa of Moore and Snedecor taken or to the arrest of Stewart, a on two occasions in connection he said "even to this day, I with the rifle purchase. But, don't know what it stands for."

Judge West upheld a defense objections by Emile Rolfs that blocked Smith's efforts to find out much money the police have paid the informer Moore over a period of time.

Watson did say he "passed a little money on to him for gaso line to keep him going" and said Moore had been a police informer for about a year before the Stewart case.

Garrison said he didn't know Stewart and had only passed a

APPENDIX M

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ISSUED APRIL 9, 1973.

M. 2

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 72

No. 72-3275

D. C. Docket No. CR 71-85

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY DICKINSON and GIBBS ADAMS,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Louisiana

Before JONES, GODBOLD and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 9, 1973

Issued as Mandate:

APPENDIX N

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT STAY OF MANDATE, ISSUED APRIL 23, 1973.

N. 2

U.S. COURT OF APPEALS
FILED
APR 23 '73
EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

No. 72-3275

LARRY DICKINSON and GIBBS ADAMS,

Defendant-Appellant.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be, and the same is stayed to and including May 9, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Warren L. Jones

UNITED STATES CIRCUIT JUDGE

OFFICE COPY

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1511

LARRY DICKINSON AND GIBBS ADAMS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ARTHUR B. HANSON
JOHN N. FERRICH, JR.
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for Amicus Curiae

[illegible] Washington, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1511

LARRY DICKINSON AND GIBBS ADAMS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as amicus curiae, respectfully urging that this Court issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 9, 1973. That decision, which was predicated upon the

court's earlier decision in the same case entered on August 22, 1972, affirmed the judgment of the United States District Court for the Middle District of Louisiana entered on October 10, 1972, which convicted the Petitioners of criminal contempt for violating an order of the District Court. The letters of the Petitioners and the Solicitor General stating their consents to the filing of this amicus curiae brief are set forth in Appendices A and B hereof.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter called "ANPA" or "Association") is a non-profit, membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,050 daily and Sunday newspapers, representing over ninety percent of the total daily and Sunday circulation of newspapers in the United States. The Baton Rouge, Louisiana newspapers for whom the Petitioners in this case were reporting, *The Morning Advocate* and *The State Times,* are members of the ANPA. The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. In that regard, the ANPA acts as a clearing house of information for its members by disseminating bulletins and research reports on all significant phases and developments of the newspaper business. Frequently, ANPA has taken positions on public matters which affect the interests of its members.

In the present case, the Association desires to present its views with regard to the necessity for this Court to review the question of whether the Petitioners were

justifiably convicted of criminal contempt for reporting about a hearing which took place in open court.

ANPA submits that if the Fifth Circuit Court of Appeals' decision in this case is left undisturbed, there will be a conflict between the law as interpreted by the Fifth Circuit Court of Appeals and the decisions of this Court as well as a conflict between the law as interpreted by the Fifth Circuit Court of Appeals and the law as interpreted by the Seventh Circuit Court of Appeals. ANPA has a particular interest in this matter because until this conflict is resolved, reporters who are improperly ordered to refrain from reporting the facts of open-court proceedings must risk a criminal contempt conviction in order to fulfill their role of providing timely news to the public about matters which the public is undisputedly entitled to receive. This situation will significantly curtail the freedom of the press to the detriment of the public. Of course, ANPA is primarily interested in urging this Court to reverse the decision below, thereby affirmatively establishing that a patently invalid order, or an invalid order based upon a rule of court, restraining the freedom of the press may be violated without criminal sanctions.

For this reason, your amicus desires to present to this Court, for its assistance, the views of ANPA in regard to the important issues raised by this proceeding.

ARGUMENT

The Association fully supports and adopts the arguments contained in the Petition for a Writ of Certiorari, except the Association wishes to emphasize that this case does not require the Court to review the narrow question of whether members of the press

should be treated differently than other citizens with regard to the circumstances under which the validity of a court order may be challenged as a defense to a criminal contempt conviction for violation of that order. As discussed below, the Court should decide this case by a determination that the order issued by the district court was patently invalid or alternatively by adoption of the principle of law set forth by the Court of Appeals for the Seventh Circuit in *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971), which permits one to collaterally attack the validity of a rule of court, as distinguished from a collateral attack upon an order issued pursuant to an adjudication between contending parties.

The District Court's Order Was Patently Invalid and the Affirmance of the Contempt Judgments Therefore Was Not in Accordance with the Decisions of This Court

In *Walker* v. *Birmingham*, 388 U.S. 307, 315 (1967), this Court noted by implication that a person may violate a court injunction which is "transparently invalid" or displays "only a frivolous pretense to validity," and then raise the invalidity of the injunction on the appeal of a contempt conviction for violating the injunction. The original decision of the Fifth Circuit in this case interpreted *Walker* in that manner:

> Absent a showing of "transparent invalidity" or patent frivolity surrounding the order, *it must be obeyed . . . United States* v. *Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) (Printed in Appendix A of Petitioners' Brief)

It is evident that the order at issue in this case was patently invalid. This is amply demonstrated by the initial opinion of the Fifth Circuit in this case, *United*

States v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972) in which Chief Judge Brown thoroughly analyzed the history of the free press-fair trial issue and set forth the reasons for the clear lack of precedence for and the clear inappropriateness of the district court's order. The opinion states the following conclusion:

> [o]ne significant circumstance is *readily apparent* —no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court . . . (emphasis added)
>
> * * * * * * * * *
>
> Even if special exigencies might justify curtailment of the right to publish court proceedings in some extraordinary circumstance—and that *if* is a very big one indeed—the present case is peculiarly ill-suited for abandonment of the traditional reluctance of courts to supervise the content of news accounts of public proceedings. 465 F.2d at 507.

Despite the circuit court's firm conclusion as to the "readily apparent" invalidity of the district court's order, the court did not find that the order was "patently invalid" so as to distinguish this case from the holding in *Walker* v. *Birmingham*, *supra*. The court seemed to be satisfied that the order was not frivilous, referring to the "conscientious" trial judge who "earnestly pursued" the "legitimate objective" of preservation of an impartial jury within the community for the anticipated state criminal prosecution. 465 F.2d at 500. However, under the *Walker* test it is not sufficient that the judge issuing an order has a subjective legitimate intent. If a court order is

determined to be patently invalid by an objective determination of legal authority, then a contempt conviction for violating the order cannot stand.

When the district court judge ordered the media to restrain from reporting the proceedings which they observed, the judge did not restrict "the small handful of spectators" present in the courtroom from telling anyone and everyone what they heard and observed. See Petitioners' Brief at Appendix F.4. This circumstance, not discussed by the court of appeals, dramatically illustrates the patent invalidity of the district court order. The court order restrained the press from publishing information which citizens of the community were permitted to discuss without limitation. Would not those citizens who were unaware of the court's order be suspicious of the press if they thought that the press voluntarily declined to report about court proceedings relating to a charge that elected state officials had pressed charges against a civil rights worker for the sole purpose of harrassment? The district court order was therefore patently invalid if only for the reason that it subordinated freedom of the press to freedom of speech.

The Decision Below Conflicts With a Decision of the United States Court of Appeals for the Seventh Circuit

Even if this Court finds that the order at issue in this case was not patently invalid and, therefore, the contempt conviction is not in conflict with *Walker* v. *Birmingham, supra,* the decision of the fifth circuit is directly contrary to a decision of the Court of Appeals for the Seventh Circuit, *In Re Oliver,* 452 F.2d 111 (7th Cir. 1971). The seventh circuit reversed a citation issued to an attorney by the District Court

for the Northern District of Illinois which reprimanded the attorney for out of court public statements violating a Policy Statement issued by the District Court. The court of appeals held that the rule of court violated by the attorney was invalid under the First Amendment and the attorney was entitled to challenge the validity of the rule in an effort to reverse the citation. The court determined that *Walker v. Birmingham, supra,* was not controlling for the following reason:

> [t]here is a fundamental distinction between the functions of a court in its usual adjudicative role, in which it is restricted to determining relative rights between parties clearly subject to its jurisdiction based upon facts then made known to the court, and the function of a court in an essentially legislative role, in which it adopts broad rules, perhaps having their greatest effect on parties not before it, based on facts largely anticipated. In this latter function courts should be treated more like legislatures than courts in that their rule-making decisions should be subject to the same sorts of challenges permitted for statutes. As one who has violated a statute and is prosecuted for such violation may challenge the validity of the statute, so should one who has violated a rule of court be permitted to challenge the validity of the rule itself. 452 F.2d at 113-114.

The order issued by the district court in this case, preventing the media from publishing the details of a hearing before the court, was not in conjunction with the court's adjudicative role, but was in conjunction with the court's rule-making or legislative role. The order was based upon the district court judge's improper application of the broad Free Press-Fair Trial rules promulgated by the district court, having

its greatest effect on parties not before the court. The order was not based upon facts known to the court, but rather was based upon the anticipation that the jurors of a possible state criminal trial might be prejudiced by published accounts of the hearing before the Federal court.

This Court should review the decision of the fifth circuit in order to resolve the conflict on this issue between that court and the Court of Appeals for the Seventh Circuit. Reporters relying upon the rationale set forth in *In Re Oliver, supra*, should not be subject to the risk of contempt convictions for failing to comply with invalid court orders issued pursuant to a rule of court. Such a situation involves a significant obstruction to a free press.

CONCLUSION

For the foregoing reasons the American Newspaper Publishers Association strongly urges the Court to grant the Petition for a Writ of Certiorari filed herein.

Respectfully submitted,

ARTHUR B. HANSON
JOHN N. FENRICH, JR.
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Telephone: 298-6161
Attorneys for Amicus Curiae

APPENDIX A

Consent of Petitioners to the Filing of An Amicus Curiae Brief by the American Newspaper Publishers Association

May 21, 1973

Arthur B. Hanson, Esquire
Hanson, O'Brien, Birney, Stickle & Butler
888 - 17th St. N.W.
Washington, D.C. 20006

Dear Mr. Hanson:

On behalf of Larry Dickinson and Gibbs Adams, Petitioners for a Writ of Certiorari in the Supreme Court of the United States (No. 72-1511), I, as their counsel, am delighted to give the American Newspaper Publishers Association permission to file a brief *amicus curiae* in support of Messrs. Dickinson and Adams.

Sincerely

MARTIN J. GAYNES

MJG/cas

APPENDIX B

Consent of Solicitor General to the Filing of An Amicus Curiae Brief by the American Newspaper Publishers Association

OFFICE OF SOLICITOR GENERAL
WASHINGTON, D.C. 20530

May 10, 1973

John N. Fenrich, Jr., Esq.
Hanson, O'Brien, Birney,
Stickle and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: United States v. Dickinson C.A. 5

Dear Mr. Fenrich,

In response to the request in your letter of May 8, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the American Newspaper Publishers Association.

Very truly yours,

/s/ ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General

FILED
JUN 7 1973
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

No. 72-1511

LARRY DICKINSON & GIBBS ADAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SIGMA DELTA CHI, AMICI CURIAE

RICHARD M. SCHMIDT, JR.,
IAN D. VOLNER,

COHN AND MARKS
1920 L Street, N.W.
Washington, D.C. 20036
293-3860

Attorneys for American Society of Newspaper Editors and Sigma Delta Chi Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

No.

LARRY DICKINSON & GIBBS ADAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SIGMA DELTA CHI, AMICI CURIAE

INTRODUCTORY STATEMENT

The American Society of Newspaper Editors ("ASNE") and the National Professional Journalistic Society Sigma Delta Chi, with the consent of Petitioners Larry Dickinson and Gibbs Adams ("Petitioners") and of the United States ("Respondent")[1] hereby submit this joint brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this litigation.

[1] Copies of such letters of consent are set forth in the Appendix hereto.

ASNE and Sigma Delta Chi believe that the decision below, punishing as contempt the publication of a factual news account concerning a public proceeding in violation of a patently invalid order prohibiting such publication, will have a profoundly "chilling effect" upon the ability of journalists to report and the public to receive information of legitimate interest and concern. We have taken the unusual step of submitting this brief because we believe the issue presented on the Petition for Writ has far-reaching implications to the maintenance of a free, independent and effective press. It, therefore, urgently requires definitive determination by this Court.

Interests of American Society of Newspaper Editors and Sigma Delta Chi

The ASNE is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble) and the on-going responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Sigma Delta Chi is the society of students and practitioners of journalism. With more than 100 student chapters and more than 100 professional chapters, its 21,000 members include the most distinguished journalists in the United States.

In their professional capacities, members of the ASNE and Sigma Delta Chi are deeply concerned with any and

all attempts to impose restraints upon the publication of *bona fide* and factual news stories. The effects of direct ordinances and court orders prohibiting publication of *bona fide* news stories upon journalistic rights and duties under the First Amendment are readily apparent. Of equal concern to the members of ASNE and Sigma Delta Chi are attempts which, although indirect, have a "chilling effect" upon the publication of legitimate news accounts. Such indirect attempts at suppression or delay of publication, as well as outright prohibitions, threaten the ability of journalists to carry out their professional responsibilities. The ultimate victim in both instances is the public, whose right to a free flow of information is denied.

The issue *sub judice* is whether the reporting of a factual account of public proceedings in violation of a court order forbidding such publication is punishable as criminal contempt when the order is patently constitutionally invalid under the First Amendment. For the reasons hereinafter set forth, we believe that a policy of compelling newsmen to obey palpably invalid orders enjoining publication of news pending appellate judicial relief would severely delay the dissemination of information of legitimate public interest and concern. The impact upon the maintenance of an independent and effective free press resulting from such unwarranted and unconstitutional publication delays is, we submit, indistinguishable from that resulting from direct and outright imposition of prior restraints.

The Requirement that Reporters Delay Publication of Factual News Accounts Pending Appeal of Patently Invalid Restraining Orders is Itself an Unconstitutional Prior Restraint

The heart of the decision below is the conclusion that newsmen must comply with court injunctions prohibiting publication of factual news accounts pending "orderly review of the injunction in question . . . ." (*U.S. v. Dickinson*, 465 F.2d 496, 512 (1972)) even though the injunction ultimately is found to be constitutionally infirm. If the consequence of compliance pending appeal is the delay of publication of a news account, the Court reasoned, "newsmen are citizens too . . . . They too may sometimes have to wait." *Dickinson, supra*, at 512. It is this rationale which brings the decision below into irreconcilable conflict with the provision and purpose of the First Amendment: the Fifth Circuit Decision does not recognize the extent to which publication will be unavoidably delayed pending exhaustion of judicial remedies; and it does not perceive the destructive effect which even the slightest delays in publishing factual news accounts has upon the role of the press in our system of government.

1. Common experience establishes that the "speedy and effective, but *orderly* review" (*Dickinson, supra*, at 512) contemplated by the Court below will itself produce substantial delays in the reporting of events of genuine public concern. In *New York Times v. United States*, 403 U.S. 713 (1971), the news accounts at issue were of extraordinary nationwide interest. The parties and courts were unstinting in their efforts – to the extent of holding special weekend sessions and early morning hearings so that appeals could be heard the same day – to reach a swift final disposition. Yet, 13 days were consumed

between the time the case first entered the courts and its final determination. It simply cannot be assumed that all cases involving the issuance of injunctions restraining publication will be subject to the same efforts. In an extraordinary situation such as the *Times* case the newspaper may have reason to anticipate litigation and be prepared for it. In the more common situation, however, the injunction prohibiting reporting of a public event comes as a complete surprise to the newsmen; as, indeed, it did here. Time is unavoidably consumed in the preparation and filing of the legal papers, particularly in the case of small and rural publications which do not have vast legal staffs or law firms at their disposal. Difficulties may be encountered in the convocation of an emergency court, especially after hours and on weekends. And, throughout this entire process, under the rationale of the Court below, the presses must be stayed.

Moreover, the Court below seemingly conceives that the restraint of an invalid injunction would be lifted immediately upon a direct appeal. However, in some cases, because of the nature of the problem or for other reasons, the appellate court may find it necessary, or at least desirable, to remand the question of the validity of the injunction for explicit consideration by the trial court which issued it. This remand may, in turn, be followed by further appeals, Petitions for Rehearing by the government and, in some cases, stays pending certiorari or appeal to this Court.

2. The devastating effect which delays in publication engendered by obedience to palpably invalid censorship orders would have upon the role of the press in our system of government does not have to be left to speculation. In *Sun Co. of San Bernardino v. Superior Court*

of San Bernardino County, 29 Cal. App. 3rd 815 (1973), the trial court entered a censorship order prohibiting the local media from publishing certain information regarding a pending trial. Obeying the ban, the newspapers refrained from publication during the pendency of the appeal. By the time the injunction was overturned by an appeals court, the trial affected by the injunction had long since ended – in convictions of the accused. Plainly, whatever value the factual news accounts concerning the trial would have had, that value was utterly destroyed in the process of seeking to have the injunction overturned.

No useful purpose would be served by compiling additional illustrations of the effects of delay in the dissemination of information. The essential point is that the value of news accounts (with the arguable exception of certain in-depth investigative reports) is substantially diminished, if not entirely destroyed, by publication delays of even one day.

3. News, then, is a highly perishable commodity. Its timeliness must be preserved because of the central role played by the press in our representative system of government.

The function of the press is clear:

> A free press stands as one of the great interpretors between the government and the people.
>
> . . . . . .
>
> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation

> than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). It is the press' function as an instrumentality of an "informed public opinion" which creates the need for immediate and unimpeded reporting of factual events concerning the activities of government by the press: the principles of control of the government by the people and accountability of government officials to the people vitally depend upon the immediate availability to the public of factual information concerning the activities of government. Thus, the public's right to receive, as well as the journalists' right to publish, information concerning the activities of government is imperiled by a requirement of restraint pending appellate review of censorship orders.

It is because of the role played by the press that prohibition against prior restraints of publication is absolute and virtually without qualification. The concept that protection against prior restraints is essential to the maintenance of a free press developed even before the promulgation of the First Amendment:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications . . . (Blackstone Commentaries on the Laws of England, Book 4, pp. 151-152 (Oxford: Clarendon Press 1765).)

That principle remains at the heart of the protection accorded by the First Amendment. And, the decisions of this Court leave no doubt that, insofar as the press and speech in general are concerned, the prohibition against prior restraints remains (as it began) absolute and without exception. See, *e.g., Near v. Minnesota, ex rel. Olson*, 283 U.S. 697 (1931); *Grosjean v. American Press, supra; New York Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States, supra.*[2]

The decision below is in error because it creates an exception to the otherwise unqualified ban upon prior restraints. The Fifth Circuit's decision leaves a newsman with absolutely no choice: He must delay publication pending appellate review or face the virtual certainty that he will be punished for contempt, regardless of the validity of the underlying censorship order. The chilling effect of the Fifth Circuit's decision is thus to achieve indirectly what a direct and outright prior restraint achieves directly – it stops the presses. The decision below is therefore not only in conflict with the prior decisions of this Court and of other circuits, but also with the history and very purpose of the First Amendment.

---

[2] Arguably, special problems which may justify temporary restraints occur when the content of the story subjected to injunction vitally affects the national security. However, the overwhelming majority of injunctions prohibiting publication of public evidence and proceedings do not bear any relation to matters of national security. See, *e.g., State ex. rel. Supreme Court of Snohomish County v. Sperry*, 483 P.2d 608 (Sup. Ct. Washington 1971) (injunction limiting reporting with respect to criminal trial); *Wood v. Godson*, 485 SW 2d 213, Sup. Ct. Arkansas 1972 (same). Similarly, the issue whether prior restraints may be imposed upon the publication of materials which are arguably obscene has no relevance here. See Emerson, *The System of Freedom of Expression*, pp. 501-512.

4. In terms of impact on the ability of the press to effectively perform the functions assigned to it, a patently invalid injunction upon publication issued by a court stands on no different footing than a patently invalid ordinance restraining publication enacted by a legislature. Indeed, in a somewhat different context, this Court has noted that litigation, as well as legislation, can imperil the rights protected by the First Amendment. The Court has held it necessary to avoid "making vindication of freedom of expression await the outcome of protracted litigation." (*Dumbrowski v. Pfister*, 380 U.S. 479, 485 (1965).) Both come into conflict with the First Amendment because they have the identical effect of suppressing information to which the public is entitled.

A patently invalid injunction as well as an ordinance should, therefore, come before the Court "bearing a heavy presumption against . . . constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) Yet, the decision below distinguishes in a way which cannot be reconciled with the First Amendment between prior restraints imposed by the legislature and those imposed by a court. In so doing, the Court inverts the presumption of invalidity which attaches to "*any* system of prior restraints" (Bantam Books, *supra*, at 70; emphasis added): under the rationale of the decision below, a censorship order issued by a court (but not by a legislature) is presumed valid and must be obeyed until overturned on appeal.

This inversion of the burden of testing the constitutionality of restraints upon publication is wholly unnecessary to preserve an appropriate respect for the judiciary and judicial processes. The question is not whether newsmen have "the absolute right to decide with impunity whether

a Judge's order is to be obeyed . . ." as the Court below framed the issue. The question is only the manner in which the validity of such censorship orders is to be tested. If a newspaper elects to test an injunction restraining publication by violating it and, in subsequent contempt proceedings, the underlying injunction is found to be valid, we do not doubt that publication is properly punishable as criminal contempt, thus preserving the power and dignity of the judiciary. By the same token, the dignity and power of the court does not require punishment if the order is found invalid. In either event, the inherent authority and dignity of the court is preserved without disruption of the role of the press or infringement upon the terms or purposes of the First Amendment. It is only when reporters are punished – as they were in the present case – for contempt entirely without regard to the constitutionality of the underlying injunction that the court's efforts to preserve its dignity and respect have a "chilling effect" upon the exercise of First Amendment rights. Only such a result compels delay of publication pending appellate review. Only such a result upsets the proper balance between respect for the processes of law and the First Amendment.

CONCLUSION

For these reasons we submit that the requirement of obedience to interim injunctions or orders prohibiting publication, pending reversal on appeal, is *ipso facto*, a prior restraint. See, *e.g.*, Freund, *The Supreme Court and Civil Liberties*, 4 Vanderbilt Law Rev. 533, 539 (1951). Since the consequences of such a restriction are intolerable, as we have shown, the principle enunciated by the Court below, we respectfully submit, cannot be allowed to stand. If, therefore, this Court does not summarily reverse the decision of the Fifth Circuit in the instant case, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD M. SCHMIDT, Jr.

IAN D. VOLNER

APPENDIX A

Office of the Solicitor General
Washington, D.C. 20530

June 1, 1973

Ian D. Volner, Esq.
Cohn and Marks
1920 L Street, N.W.
Washington, D.C. 20036

Re: Dickinson and Adams v. United States
No. 72-1511, October Term, 1972

Dear Mr. Volner,

In response to the request in your letter of May 30, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the American Society of Newspaper Editors and Sigma Delta Chi.

Very truly yours,

Erwin N. Griswold
Solicitor General

MARCUS COHN
LEONARD H. MARKS
PAUL DORIN
STANLEY S. NEUSTADT
STANLEY D. COHEN
RICHARD M. SCHMIDT, JR.
ROY F. PERKINS, JR.
MARTIN J. GAYNES
JOEL N. LEVY
ROBERT P. JACOBI
RONALD A. SIEGEL
ROY R. RUSSO
ALLAN J. KNOUR
WARENCE N. COHN
IAN D. VOLNER
RICHARD A. HELMICK

LAW OFFICES
COHN AND MARKS
1920 L STREET, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
(202) 293-3860

CABLE ADDRESS
COMAR-WASHINGTON, D.C.

May 14, 1973

Ian D. Volner, Esq.
Cohn and Marks
1920 L Street, N. W.
Washington, D. C. 20036

Dear Mr. Volner

The undersigned is co-counsel for Larry Dickinson and Gibbs Adams, petitioners for a writ of certiorari in the Supreme Court.

On behalf of Mrssrs. Dickinson and Adams, I am delighted to accord you permission, as counsel for the American Society of Newspaper Editors, to file an amicus curiae brief on behalf of the American Society of Newspaper Editors, supporting the position of petitioners Dickinson and Adams.

Sincerely,

Martin J. Gaynes

APPENDIX B

WASHINGTON, D.C. ss:

AFFIDAVIT

Ian D. Volner, being duly sworn, deposes and says:

1. I am one of the attorneys for the American Society of Newspaper Editors and Sigma Delta Chi, amici curiae in: Dickinson and Adams v. United States of America, Case No. 72-1511. I am a member of the Bar of the District of Columbia, but not of the Supreme Court.

2. I caused to be served the foregoing Brief in Support of Petition for Certiorari of American Society of Newspaper Editors and Sigma Delta Chi to be served upon the parties listed below by transmitting the same, postage prepaid, to such parties at the addresses specified below or as indicated by hand delivery thereof.

3. The parties upon whom the foregoing Brief was served are as follows:

(a) Leonard H. Marks, Esq.
Martin J. Gaynes, Esq.
Cohn and Marks*
1920 L Street, N.W.
Washington, D.C. 20036
Counsel for Larry Dickinson and Gibbs Adams

(b) Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

*By Hand

(c) E. Barrett Prettyman, Jr., Esq.
Robert R. Bruce, Esq.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Counsel for The Reporters Committee for Freedom of the Press

(d) Arthur B. Hanson, Esq.
John N. Fenrich, Jr., Esq.
888 17th Street, N.W.
Washington, D.C. 20006
Counsel for the American Newspaper Association

Respectfully submitted

Ian D. Volner

Subscribed and sworn to before
me this 6th day of June 1973

Notary Public

My Commission Expires: Sept 30, 1973

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DARK PAGE BLEED THRU

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1511

LARRY DICKINSON AND GIBBS ADAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A) is reported at 465 F. 2d 496; the second opinion of the court of appeals (Pet. App. B) is reported at 476 F. 2d 373. The first opinion of the district court (Pet. App. I) is not reported; the opinion of the district court on remand (Pet. App. J) is reported at 349 F. Supp. 227.

JURISDICTION

The judgment of the court of appeals (Pet. App. M) was entered on April 9, 1973. The petition for a writ of certiorari was filed on May 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case a court order forbidding detailed newspaper accounts of a federal district court hearing, issued for the purpose of assuring a fair trial in a pending state prosecution, was so "transparently invalid" or patently frivolous that petitioners may not be held in contempt for knowingly violating it.

STATEMENT

1. Petitioners Larry Dickinson and Gibbs Adams, reporters for two Baton Rouge, Louisiana newspapers, were convicted of disobeying an order of the United States District Court for the Eastern District of Louisiana, in violation of 18 U.S.C. 401. Each was fined $300.

The record, which is detailed in the opinion of the court of appeals (Pet. App. A.1–A.17), shows that on April 1, 1970, one Frank Stewart, a civil rights worker in Baton Rouge, Louisiana, was indicted in a Louisiana state court on charges of conspiring to murder the mayor of Baton Rouge. Stewart thereupon commenced an action in the United States District Court for the Eastern District of Louisiana, alleging that the prosecution had been brought for the sole purpose of harassing him and suppressing his First Amendment rights. After a hearing, the district court declined to issue an order enjoining further state proceedings. *Stewart* v. *Dameron,* 321 F. Supp. 886 (E.D. La.). The Court of Appeals for the Fifth Circuit vacated the or-

der and remanded the case for a further evidentiary hearing, in accord with *Younger* v. *Harris*, 401 U.S. 37 (448 F.2d 396).

On November 1, 1971, the second hearing was held, limited solely to the issue of prosecutorial motive.[1] During this hearing, the district court concluded that evidence would be elicited that might prejudice the rights of litigants in the upcoming state trial.[2] Therefore, at 10:30 a.m., the court issued an order (Pet. App. A.3) prohibiting the news media, on penalty of contempt, from publishing details of the testimony adduced at the hearing, but allowing the media to report the fact that the hearing was being held.[3] The hearing adjourned at 11:55 a.m., to resume the

[1] At the conclusion of the second hearing, the district court rejected Stewart's claim, but the court of appeals remanded again for additional evidence. *Stewart* v. *Dameron*, 450 F.2d 278 (C.A. 5).

[2] Under Article 578 of the Louisiana Code of Criminal Procedure, no trial shall be commenced for felonies other than capital cases after two years from the date the prosecution begins. Stewart, indicted on April 1, 1970, was presumably going to be tried on the state charges before April 1, 1972—*i.e.*, sometime within five months after the district court hearing on November 1, 1971.

[3] The order, in its entirety, provided (Pet. App. C.2):

"And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rule in connection with Fair Trial—Free Press provisions, the Rules of this Court.

"It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be

next morning at 9:00. Petitioners, two reporters present at the November 1 hearing, wrote articles (published in local newspapers on November 1 and November 2) which summarized the first morning's evidence in detail and acknowledged the writers' awareness that their actions violated the order.

2. On November 2, 1971, the district court issued orders that petitioners show cause why they should not be held in criminal contempt of court (Pet. Apps. D & E). Petitioners answered that the order violated their First Amendment rights. On November 8, 1971, following a hearing on the orders to show cause, petitioners were found guilty of criminal contempt and each was sentenced to pay a fine of $300 (Pet. Apps. G & H). In explaining its reasons for the contempt convictions (Pet. App. F.2–F.7, I.2–I.8), the district court noted, *inter alia,* that even though the hearing on November 1 had ended at noon, "[n]o effort was made that day, or at any other time, by either respondent to set aside the order, despite the fact that they had all afternoon in which to have contacted

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had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

"This order is made subject to the sanctions provided by law in the event of any violation of this order.

"Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently, I do not want—and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial—of this hearing."

either this Court or the Court of Appeals had they wished to do so. To the knowledge of these reporters, the Fifth Circuit Court of Appeals has a standby panel to handle emergency matters such as this" (Pet. App. I.4; cf. Pet. App. I.6, F.6).

On August 22, 1972, the court of appeals held (Pet. App. A) that although the district court's order prohibiting the publication of testimony violated petitioners' First Amendment rights, they were still subject to a contempt conviction on the ground that "[a]bsent a showing of 'transparent invalidity' or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process * * *" (Pet. App. A.12). The court then remanded the case to the district court "for a determination of whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm" (Pet. App. A.17).[4]

[4] 18 U.S.C. 401 provides in pertinent part that "[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as * * * [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." The court of appeals made no effort to reconcile its holding with the language of 18 U.S.C. 401, which permits punishment only for disobedience of "lawful" orders, presumably because it felt that this issue had been resolved by a long line of decisions which, while not discussing the language of Section 401, have nevertheless indicated that punishment may be imposed for disobedience of unlawful orders not challenged by direct appeal. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 314, n. 5; *O'Heaney* v. *United States*, 66 F. 2d 933 (C.A.D.C.), certiorari

On remand, the district judge adhered to his original determination to punish petitioners for contempt. He stated (Pet. App. J.4–J.5):

> It was not the fact that this Court then and now believes its order was a valid one that alone gave rise to the contempt citation. It was the fact that these defendants, rather than seek an available judicial review of the Court's order, decided instead to announce to Court personnel that they were going to violate the order and then, after violating the order, contemptuously announced to the public, at the end of their published articles, that they had published this story despite an order of Court ordering them not to do so. It was primarily this public display of utter contempt for this Court's order that prompted the contempt citation. The defendants, as noted by the Court of Appeals, may "not now escape the inescapable legal conse-

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denied, 290 U.S. 683; *McCann* v. *New York Stock Exchange*, 80 F. 2d 211 (C.A. 2), certiorari denied *sub nom. McCann* v. *Leibell*, 299 U.S. 603. See, also, *Trickett* v. *Kaw Valley Drainage Dist.*, 25 F. 2d 851 (C.A. 8), certiorari denied, 278 U.S. 624; *Kaspar* v. *Brittain*, 245 F. 2d 92 (C.A. 6), certiorari denied, 355 U.S. 834; *Clatt* v. *Hammonds*, 305 F. 2d 565 (C.A. 5); *Nelson* v. *Steiner*, 279 F. 2d 944 (C.A. 7); *United States* v. *Schine*, 260 F. 2d 552 (C.A. 2), certiorari denied, 358 U.S. 934; *United States* v. *Thompson*, 349 F. 2d 665 (C.A. 2); *Schwartz* v. *United States*, 217 Fed. 866 (C.A. 4). Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, and *United States* v. *Shipp*, 203 U.S. 563, both involving disobedience of preliminary injunctions which had been issued to preserve the *status quo* pending a determination of whether there was jurisdiction to grant the ultimate relief. Such orders are within the inherent power of a court and cannot be classified as "unlawful." *United States* v. *United Mine Workers*, *supra*, 330 U.S. at 292; *United States* v. *Shipp*, *supra*, 203 U.S. at 573.

quences for their flagrant, intentional disregard of the mandates of a Court."

On appeal a different three-judge panel of the court of appeals affirmed the contempt conviction, after noting that it had not been persuaded that its earlier holding was wrong and that petitioners had not petitioned for rehearing *en banc* or certiorari (Pet. App. B.3). On April 23, 1973, following petitioners' motion, the court of appeals ordered a stay of its mandate pending timely filing of a petition for certiorari (Pet. App. N).[5]

ARGUMENT

Petitioners' basic argument is that the district court's order forbidding publication of hearing testimony was "patently invalid" and that therefore disobedience was justified and they were not required to make any effort to obtain orderly appellate review. Petitioners rely on various decisions of this Court upholding the freedom of the press to report on proceedings in open court, which suggest heavy presumptions against the validity of prior restraints (Pet. 8–16). It is our position that the opinion of the

[5] The initial contempt determination was made by the district court *sua sponte*. The United States was not a party to the underlying litigation in which the order that petitioners disobeyed was issued, and the Department of Justice did not seek the imposition of contempt sanctions. When petitioners filed their notices of appeal to the Fifth Circuit, the district judge asked the United States Attorney to defend the judgments of conviction. Our position here is urged solely in defense of a determination of "[a] court of the United States" which has exercised its discretion to punish for disobedience of its orders (18 U.S.C. 401).

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court of appeals (Pet. App. A), on which we principally rely, was not inconsistent with these decisions and correctly resolved the issue before it.

1. While the court of appeals held that the order in question was invalid, the opinion read as a whole makes clear that the district court, faced with the difficult task of reconciling conflicting rights, was not acting "frivolously." As the court below pointed out (Pet. App. A.2), the instant case involves a confrontation between "two of the most cherished policies of our civilization" (*Bridges* v. *California,* 314 U.S. 252, 260)—freedom of the press and the right to a fair and impartial trial. "The balance is delicate with so much at stake, and the equipollence of the interests defies a simple resolution by mere judicial tug-of-war, with the 'lesser' bantam liberty giving way to a weightier, more Herculean one. Cf. Karr v. Schmidt, 5 Cir. (en banc), 1972, 460 F. 2d 609" (Pet. App. A.5). After describing the historical tension between the First and Sixth Amendments (*id.* at A.5–A.6), the court below noted that within the past fifteen years increasing recognition has been given to the very real potential of news media to prejudice the right to fair trial (*id.* at A.6–A.7). See, *e.g., Marshall* v. *United States,* 360 U.S. 310; *Irvin* v. *Dowd,* 36 U.S. 717; *Rideau* v. *Louisiana,* 373 U.S. 723. In *Sheppard* v. *Maxwell,* 384 U.S. 333, this Court emphasized the need for the trial judge to protect the accused from the prejudicial impact of an "omnipresent press" (Pet. App. A.8), so that "the balance is never weighed against the accused" (384 U.S. at 362). "If publicity during the proceedings threatens the fairness of the

trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception" (*id.* at 363; see Pet. App. A.7–A.8).

The court of appeals observed further (Pet. App. A.9) that the Free Press-Fair Trial Rules for the Eastern District of Louisiana, on which the district court relied in promulgating its order, provide "great elasticity and room for judicial inventiveness" in widely publicized and sensational cases.[6] For example, Local Rule 9 provides (Pet. App. A.9, n. 11) that in such cases the court

> on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and the sequestration of jurors and witnesses, *and any other matters which the Court may deem appropriate for inclusion in such an order.* [Emphasis added.]

Notwithstanding its recognition that *Sheppard* and other recent cases contain strong language urging trial judges to anticipate and prevent prejudicial outside influences in criminal trials, the court of appeals concluded that in the circumstances of the instant case

[6] The local "Free-Press—Fair Trial" rules for each district implement the recommendations which the Judicial Conference of the United States formulated in response to *Sheppard*, *supra*.

no grave and immediate danger justified a restriction on freedom of the press. The court determined that the leading authorities should not be read to limit the right of the press to publish reports of proceedings in open court—although again the difficulty of the problem is illustrated by the "possible exception" suggested by language in *Branzburg* v. *Hayes*, 408 U.S. 665, 685, which stated that newsmen "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal" (Pet. App. A.10, n. 14).[7]

While the opinion below adequately supports its conclusion that the order in question was not "transparently invalid," we think that certain other factors reinforce the conclusion that the district court's order was not frivolous. Though overruled by the court of appeals, the trial judge's findings that newspaper descriptions of the hearing would present a serious and imminent threat to the fairness of an upcoming trial

[7] The court of appeals listed some additional factors leading to its finding that the order was invalid (Pet. App. A.10-A.12): The threatened disruption of proceedings seemed less severe here than in cases such as *Sheppard*, *supra*; the subject matter of the hearing was particularly newsworthy; the injunction was directed at non-parties to the lawsuit, with no intent to insure the fairness of an *ongoing* trial; the trial judge had alternative remedies available, such as continuance or change of venue, which—though not always totally effective—would have been preferable to a ban on publication; and, finally, it may be inappropriate for a federal court to anticipate denials of constitutional rights in state courts and to "polic[e] the climate of the community to insure a sterile" state trial (*id.* at A.11).

had substantial evidentiary support. The potential for wide-spread and intensive publicity about the hearing was great in view of the sensational nature of the accusations on both sides. Moreover, the danger of prejudice to Stewart's Sixth Amendment rights appeared to be imminent, since the prescriptive period for trial on the state charges was about to run (Pet. App. F.3). We observe, moreover, that immediacy of danger might validly be judged with reference not to the estimated time of trial, but rather to the time at which irreparable damage to constitutional rights actually occurs. In the instant case, it was not unreasonable to conclude that newspaper accounts of the hearing might cause, at the time of publication itself, irreversible prejudice to the rights of the accused and the public to have an impartial jury trial at the place where the crime was allegedly committed (see Pet. App. F.5). Under these circumstances, petitioners had no right to disregard the district court's order as frivolous or transparently invalid. See *United States* v. *Tijerina*, 412 F.2d 661, 666–667 (C.A. 10), certiorari denied, 396 U.S. 990.

2. We rely as well on that part of the opinion by the court of appeals holding that petitioners may not escape a contempt conviction on the ground that the order which they knowingly violated turned out to be invalid (Pet. App. A.12–A.17). As the court noted (*id.* at A.12–A.13), it is well-settled that invalidity is no defense to criminal contempt; absent a showing of "transparent invalidity," court orders must be obeyed until reversed by orderly review—a principle that applies even where the order in question violates First Amendment

rights. *E.g., Walker* v. *City of Birmingham*, 388 U.S. 307.[8]

The court of appeals observed further that the unique role and problems of the judiciary justify the inviolability of its orders, as opposed to the mandates of legislators or executive agencies (Pet. App. A.13). Nor should these principles be any less controlling when the interest at stake is free press

[8] In *Walker*, *supra*, this Court upheld the criminal convictions of a group of black ministers for violating an *ex parte* injunction issued by an Alabama court forbidding them from engaging in street demonstrations without a municipal permit as required by city ordinance. The petitioners in *Walker* attacked the injunction and the city parade ordinance on First Amendment grounds and argued that the ordinance had been discriminatorily applied (prior to the injunction, requests for demonstrations had been twice denied). On appeal this Court held that petitioners' constitutional challenges—which included arguments of prior restraint, see 388 U.S. at 342—did not need to be considered at the contempt hearing since no effort had been made either to dissolve the injunction or to comply with it by applying for a permit.

Petitioners in the instant case attempt to distinguish *Walker* and related decisions on the ground that there is a distinction between the communication of ideas by "marching and picketing (the conduct at issues in *Walker*)" and communication by pure speech, such as the newspaper accounts involved in the case at hand (Pet. 14). In the case at hand, however, where free expression threatens the right to a fair trial, the interest involved in protecting an accused from prejudicial news stories is highly analogous to that involved in protecting people from excessive obstructions to the conduct of their daily affairs—the consideration at the heart of the speech/conduct distinction justifying reasonable regulations as to the time and place of street demonstrations. Indeed, it would seem that a restriction on speech might more likely be upheld if the competing value were the right to a fair trial—"the most fundamental of all freedoms," *Estes* v. *Texas*, 381 U.S. 532, 540–541—rather than public convenience.

rather than free speech (*id.* at A.14). Finally, the court concluded, after thorough discussion (*id.* at A.14–A.16), that the rule requiring obedience to invalid (though not "frivolous") court orders presupposes the existence of three conditions, all of which it found to be present in the instant case: "(i) [T]he court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling; and (iii) the order must not require an irretrievable surrender of constitutional guarantees." Especially significant in regard to the latter two requirements is the observation in the opinion below (*id.* at A.15; footnote omitted) that, "as the District Court's findings of fact establish, both the District Court and the Court of Appeals were available and could have been contacted that very day, thereby affording speedy and effective but *orderly* review of the injunction in question swiftly enough to protect the right to publish news while it was still 'news'."

Given the availability of rapid review procedures, the injury to First Amendment values caused by compliance with the District Court's order until it was lifted would have been slight or nonexistent.[9] It is appropriate to insist upon that compliance in an area where some restrictions on the press may be justified by Sixth

[9] Petitioners are in a poor position to challenge the adequacy of the judicial remedy, since they failed to seek relief from the order of the district court. Had they sought such relief, and had it not been promptly forthcoming, disobedience to the order in such circumstances would have presented a different problem.

Amendment necessities, because newsmen ought not to be encouraged to guess at their peril, and the peril of the litigants, whether a court order is lawful. Indeed, the net effect of a rejection of the Fifth Circuit's holding may be a material diminution of the access of the press to information about judicial proceedings in cases of this nature, since trial judges may choose to resort to *in camera* hearings when they anticipate that widespread public dissemination of information about such proceedings may do serious injury to Sixth Amendment interests. In such cases, the option of self-help would be foreclosed, and the press would be forced to the recourse of judicial review.

3. Petitioners (and the various *amicus* briefs) rely heavily on certain decisions which they claim are inconsistent with the result reached by the court of appeals in the instant case.

a. *Thomas* v. *Collins*, 323 U.S. 516, which petitioners call "dispositive" (Pet. 13), does not support their position. That case involved a Texas statute requiring labor leaders to procure an organizer's card before soliciting memberships in unions. Thomas was held in criminal contempt and sentenced to confinement for purposefully disobeying a temporary *ex parte* court order restraining him from violating the statute. Application for a writ of habeas corpus was made to the Texas Supreme Court, which sustained the contempt conviction. On appeal, this Court invalidated the statute as violative of the First Amendment. Petitioners seek to extract from *Thomas* the principle that an in-

valid restriction on free speech through the device of a court order is subject to collateral attack no less than an invalid statute purporting to achieve the same result (Pet. 13).

The Court in *Thomas,* however, considered the appellant's constitutional objections only because the Texas Supreme Court, viewing habeas corpus as an appropriate vehicle for challenging statutory validity, had itself passed judgment on and upheld the Act. As the Court explained (323 U.S. at 524, n. 7), the Texas "court reviewed the contempt commitment over appellee's strenuous jurisdictional objections. Since the state court has determined the validity of the statute and its application in the habeas corpus proceeding, as against the objections on federal constitutional grounds, those questions are properly here on this appeal. *Bryant* v. *Zimmerman,* 278 U.S. 63. The State concedes this." Obviously, the State of Texas was free, if it so chose, to accept invalidity of the order as a defense to a contempt conviction, and this Court disposed of the case on that premise. Thus there was no need in *Thomas* to consider the constitutional necessity of permitting collateral attack on an invalid restriction during an appeal from a contempt conviction, and the only issue explicitly considered was the constitutionality of the Texas statute as applied.

Moreover, unlike petitioners here, the petitioner in *Thomas* had no adequate remedies available for orderly review. The order was served upon him in Houston, a distance of 170 miles from the issuing court in Austin, six hours before his scheduled speech.

Significantly, the opinion in *Thomas* reflected the court's implicit assessment that orderly review was not even a practicable choice. See 323 U.S. at 536.

b. In attempting to demonstrate a conflict between the circuits, petitioners point to a Seventh Circuit decision, *In re Oliver*, 452 F.2d 111 (Pet. 16–17). That case involved a disciplinary proceeding against an attorney for violating a general policy statement, adopted by a federal district court, containing a blanket prohibition against all extrajudicial comment by counsel in regard to all pending cases. The court of appeals, in striking down the general rule, held that the validity of the rule could be challenged even after a knowing violation. The court rejected the argument that cases such as *Walker, supra,* where a knowingly violated injunction is challenged, are equivalent to cases where a local rule of court is violated and its validity challenged.

The rationale behind the court's distinction between local rules and injunctions, however, indicates that the court order in the instant case would have been considered by the Seventh Circuit to be analogous to the injunction involved in *Walker*. The reasons given in *Oliver* to support its distinction between disobedience of an injunction and of a local rule were (1) that a person who has neither violated a local rule nor been personally advised of the risk of disciplinary action may lack standing to attack the rule, and (2) that circumstances could exist in which one might violate a local rule though unaware either of the rule

itself or of its application to him at the time of the violation. 452 F. 2d 113.

Neither reason can be invoked in the instant case, in which a court order was issued in the presence of a specific group of spectators—including petitioners—forbidding any published reports of evidence overheard that morning. Petitioners do not even assert that they lacked standing for direct review; nor is it reasonably likely that spectators present at the hearing might not have known of the order or of its application to them. Moreover, unlike the court order in the case at hand, the policy statement at issue in *Oliver*, with its blanket ban on all comment in all cases, failed to reflect even a token regard for the question whether the prohibited conduct would prejudice the fair administration of justice. See 452 F. 2d at 115. The court therefore held that the local rule makes "a mockery of the free speech guaranty of the first amendment" (*id.* at 115), implying an assessment, in accordance with the principles underlying the instant decision, that the rule was "transparently invalid."

c. The state decisions on which petitioners rely do not demonstrate a conflict with the Fifth Circuit as to the propriety of constitutional challenges to a court order following a knowing violation. These cases—*Phoenix Newspapers, Inc.* v. *Superior Court*, 418 P. 2d 594 (Ariz.); *State ex rel. Superior Court of Snohomish County* v. *Sperry*, 483 P. 2d 608 (Wash.); *Wood* v. *Goodson*, 485 S.W. 2d 213 (Ark.)—involved the interpretation of provisions in state constitutions

that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."[10] This language has been interpreted as an absolute prohibition on prior restraints and thus has been considered stronger in some respects than the command of the First Amendment. *Phoenix Newspapers, supra,* 418 P. 2d at 596. In light of this reasoning, the court in *Phoenix Newspapers* voided the court order forbidding publication of hearing testimony and did not even reach the issue of validity under the federal constitution.[11]

In short, no judicial authority commands a result different from that reached in the instant case. As the court below held, the determination of the district court was neither transparently invalid nor patently frivolous. Accordingly, under *Walker* v. *City of Birmingham,* the contempt order was not unconstitutional.

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[10] See Arizona Constitution, Art. 2, §6; Washington Constitution, Art. 1, § 5; Arkansas Constitution, Art. 2, § 6 (containing a minor variation, provides in pertinent part: "[A]ll persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right").

[11] The state cases cited are distinguishable on additional grounds. For example, in *Sperry, supra,* the Washington Supreme Court held that a trial judge presiding over a murder trial could not by prior order forbid the reporting of certain proceedings, including testimony ruled inadmissible. The appellant newspaper reporters had deliberately violated the orders by writing accounts of evidence excluded after a hearing in the jury's absence; the reporters were nevertheless allowed to make a collateral attack on the order in appealing a contempt judgment. The court in *Sperry* accepted the applicability of *Walker* v. *City of Birmingham* but held that the order was

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1973.

"patently invalid" under the particular circumstances. The court stressed that the judge had available a less drastic alternative—sequestration of the jury during the trial—a procedure unavailable in the instant case. It also observed, *inter alia*, that there was little chance for adequate and effective review on direct appeal (483 P. 2d at 611) and that on a direct appeal the reporters would have had standing problems under state law (concurring opinion, 483 P. 2d at 614). See similarly *Wood* v. *Goodson*, *supra*.

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OCTOBER TERM, 1973

LARRY DICKINSON AND GIBBS ADAMS,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For a Writ of *Certiorari* To
The United States Court of Appeals
For The Fifth Circuit

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1511

LARRY DICKINSON AND GIBBS ADAMS,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For a Writ of *Certiorari* to The United States Court of Appeals For The Fifth Circuit

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REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

Petitioners Dickinson and Adams hereby respectfully reply to the Brief in Opposition to Petitioners' Request for a Writ of *Certiorari*. Petitioners believe that the position taken by the government in this case is unpersuasive and untenable.

In reading the government's brief, one would hardly be aware that this case concerns an unprecedented prior restraint on the press, flatly inconsistent with the First Amendment, and explicitly contrary to the prior decisions of this court. Petitioners were convicted for failing to obey a decree whereby the District Court attempted to prevent the press from reporting material observed in open court, despite the clear pronouncement of this court that "a trial is a public event. What transpires in the court room is public property*** Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."[1]

The government, of course, concedes the invalidity of the decree, and further concedes that the decree would not have to be obeyed if it were "patently invalid." The government urges, however, that petitioners' contempt conviction should be affirmed because the Court of Appeals below was not acting "frivolously," was attempting to "reconcile conflicting rights" (freedom of the press and the right to a fair and impartial trial), and its action "was not inconsistent" with prior Supreme Court decisions (Brief, pp. 7-9). Petitioners urge that the government is incorrect in each of these assertions.

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[1] See *Craig v. Harney*, 331 U.S. 376, 374 (1947).

The government's principal error lies in its failure to recognize the legal implications of the fact that we are here dealing with a *prior restraint* of the press. Such a direct constriction of First Amendment freedoms can be upheld, if at all, only upon the most compelling and pressing showing of actual overriding public need.[2] But no such showing had even been attempted to be made below. Indeed, it would be difficult to conceive of a more "patently" invalid and "frivolous" order than the one at issue here, which attempted to accomplish what this court has repeatedly indicated cannot be accomplished by any court: forbidding the press from merely reporting what they observed in open court.

The government attempts to meet the "heavy presumption" against the constitutional validity of the prior restraint by pointing to an alleged conflict between free press, on the one hand, and the right to a fair and impartial trial, on the other. The government contends that the Trial Judge found "that newspaper descriptions of the hearing would present a serious and imminent threat to the fairness of an upcoming trial." The government also asserts that the Trial Judge's findings in this respect "had substantial evidentiary support" (Brief in Opposition, pp. 10-11). The government, however, can cite no evidentiary support for these assertions, and for the very simple reason *that no such evidentiary support exists.* The proposition that factual newspaper descriptions of the hearing would pose a threat to anyone's right to a fair trial was a bare assertion of the Trial Judge, which found no evidentiary support in

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[2] See *New York Times Co. v. United States*, 403 U.S. 712, 313-14 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1936); see also *Near v. Minnesota ex. rel. Olsen*, 283 U.S. 697 (1931).

the record. At no time and in no way was there ever any demonstration that mere newspaper coverage posed a threat to anyone's constitutional rights. The Trial Court never made any factual "findings" in this respect, nor did it purport to base its order upon any such evidentiary showing.[3]

The Trial Court's opinion makes clear that the basis of its unsupported order was a *bare theoretical possibility* that in some unspecified way there *might* be some unspecified harm to unnamed and unspecified persons (emphasis added; see Pet. App. c. 2):

> It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case *will, in all probability,* be the subject of further prosecution; at least, there is the *possibility that it may.* In order to avoid undue publicity *which could in any way interferere* with the rights of the litigants in connection with any further proceedings *that might be had in this or other courts,* there shall be no reporting of the details of any evidence taken during the course of this hearing today.
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> This order is made subject to the sanctions provided by law in the event of any violation of this order.

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[3] The Trial Court's assertion that mere newspaper coverage of a trial could prejudice someone's rights was not a conclusion of fact or law. It was merely an argument with history. The framers of the Constitution decided long ago that the greater danger lies in not allowing the press to cover a trial, and the First Amendment is written explicitly to prevent any court from attempting to shroud its proceedings with secrecy.

Paradoxically, the Court of Appeals itself relied upon the *absence* of any real disruption or invasion of Sixth Amendment rights as a ground for holding the order to be invalid.[4] The alleged collision course between constitutional rights, upon which the Brief in Opposition so heavily relies, had no basis in the real world, and was nothing more than a bare theoretical assumption of a future possibility. If the heavy burden which must be borne by the government to support any prior restraint can be met merely by the assertion of the possibility of a conflict arising in the future between constitutional rights, then freedom of the press as we know it would be held hostage to the fertile imagination of judges.[5] But, as this court has frequently pointed out,[6] such is not the law.

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[4] See Pet. App. A.10-A.12. The government has recognized this paradox in footnote 7 of its Brief in Opposition, though it does not face its implications. It is admittedly difficult for the government to argue, on the one hand, that there was a real threat to Sixth Amendment rights and, at the same time, recognize that the very implausibility of such a threat was the grounds upon which the decision it now supports relies.

[5] Or, indeed, the fertile imagination of government brief writers. See pp. 10-11 where the government's arguments with respect to the possibility of prejudice are based solely upon speculation devoid of evidence that the dangers which it decries, in fact existed.

[6] See *New York Times Co., Bantam Books, Near v. Minnesota ex. rel. Olsen, supra.*

The government (as did the Court of Appeals below) heavily relies upon this court's decision in *Walker v. City of Birmingham,*[7] despite the fact that *Walker* did not involve prior restraint of the press, and the fact that in *Walker* the court carefully and explicitly drew a distinction between the protection afforded to the communication of ideas by conduct such as picketing, and the protection afforded to those who communicate ideas by pure speech, a distinction which the court had earlier emphasized in *Cox v. Louisiana.*[8] The government seeks to avoid the impact of this distinction by asserting that the interest involved in protecting "an accused from prejudicial news stories is highly analogous to that involved in protecting people from excessive obstructions to the conduct of their daily affairs." (Brief, p. 12. footnote 8). But by this reasoning, almost any action could be termed "highly analogous" to free speech, and the distinction which the court carefully drew in *Walker* would be obliterated.[9]

The government urges that because petitioners could have sought review in the Court of Appeals on the very day of the injunction, and the court would have afforded "speedy and effective but *orderly* review of the injunction

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[7] 388 U.S. 308, 316 (1967).

[8] 379 U.S. 536, 555 (1965).

[9] It is submitted that there is a far stronger "analogy" between picketing and free speech than the strained analogy which the government attempts to assert in its brief (footnote 8) between protection from prejudicial news stories and protection of people from the actions of others. Yet, the existence of such facile analogies did not prevent the court from making the clear distinction between speech and action which lies at the basis of its *Walker* and *Cox* decisions.

in question swiftly enough to protect the right to publish news while it was still 'news' ", (Brief p. 13, emphasis in original) they therefore were required to do so, and could not violate even an invalid order until its invalidity had been determined by direct (rather than collateral) attack. There are at least two difficulties with this position. First, the government again ignores the simple fact that with respect to the press, a court-imposed injunction for as little as a day or an hour is a prior restraint which is presumptively and *prima facie* invalid. Admittedly, the policy against prior restraints is unique. But it is unique exactly because this court has recognized the overwhelming importance of a free press to the conduct of the nation's business. A prior restraint is no less noxious because it operates during a period of so-called "rapid review" than it would be if it operated during a longer, more normal procedure.

Moreover, it is sheer speculation on the government's part that review would have been "speedy and effective but *orderly*." How speedy is speedy? And how long does it take before a story no longer becomes newsworthy? Petitioners point out that they filed their notice of appeal from the District Court's contempt conviction on September 8, 1971. The Court of Appeals order invalidating the judge's injunction against the press, and remanding the case to the District Court for consideration of the contempt conviction in view of its invalidation of the underlying order, was not remanded until August 22, 1972, *more than nine months later*. Although this time table might have been speeded up, there is simply no way of knowing whether the review proceedings could possibly have been finished "swifty enough to protect the right to publish news while

it was still news.' "[10] More important, how can the government justify forcing news reporters and newspapers to undertake costly litigation to review muzzle orders which are in violation of the Supreme Court's repeated admonitions against prior restraints? It is precisely the necessity of undertaking such review proceedings which constitutes the "chilling effect" against which the doctrine forbidding prior restraints was constructed.

The balance of the government's brief is devoted to a rather tortuous attempt to reconcile the Court of Appeals' opinion below with numerous federal and state cases which point precisely in the opposite direction. Petitioners believe no extended discussion is necessary here because the government's reasoning falls of its own weight. The significant point, however, is that nowhere does the government assert that:

a. The question presented is unworthy of considerations by this court, or

b. The question is of such limited scope as to render review inappropriate.

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[10] Even the Pentagon Papers case, of momentous impact on the nation, took more than a month before the Supreme Court issued its final ruling, after invoking extraordinary procedures, and in the face of an opinion by the Chief Justice that the process had been far too swift for orderly review. See *New York Times Co. v. United States*, 403 U.S. 712, 748 (1971). Does the government seriously contend that justice is advanced by forcing reviewing courts to operate under excrutiating time pressures?

The reason for these omissions is clear. The instant case presents a question of vital importance to a free press. If the Court of Appeals decision is allowed to stand, a weapon would be loosed which would render the First Amendment prohibition against restriction of the press less a shield than a chimera. Petitioners urge that the record requires either summary reversal or grant of the requested writ.

Respectfully submitted,

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